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Supreme Court, U.S.
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No. (1) - 97 - 76

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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1997

SOL GROSS, Trustee of PANTHER HOLLOW CORPORATION and PANTHER HOLLOW CORPORATION,

Petitioner.

vs.

THE CITY OF PITTSBURGH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Questions Presented for Review

1. Did the Third Circuit err when it held that Sol Gross was not entitled to nominal damages (or any damages) for the violation of his civil rights by an arrest that was found to be arbitrary and capricious?

2. Did the Third Circuit violate the 7th Amendment when it substituted its conclusions for those of the jury as to factual matters?

Parties to the Proceedings Below

The parties below are Sol Gross, an individual and Panther Hollow Corporation, Plaintiffs; and, the City of Pittsburgh, Defendant. Other parties originally listed in the complaint were removed by summary judgment and order of court.

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Opinions Delivered in the Courts Below

The unpublished opinion of the Third Circuit Court of Appeals filed March 14, 1997 at No. 96-3242 and 96-3267 was not reported, but appears in the appendix (Appendix B, page 3a).

A Petition for Rehearing was denied by Order dated April 11, 1997, filed at 96-3242 and 96-3267, was not published, but appears in the appendix (Appendix A, page 1a).

The opinion of the Honorable Robert C. Gallo dated July 7, 1992 at SA 3428-90 in the Court of Common Pleas of Allegheny County, was not published, but appears in the appendix (Appendix E, page 27a).

Statement of Jurisdiction

Petitioners seek review of the Order of the Third Circuit Court of Appeals entered on April 11, 1997 (Appendix A, page 1a), denying Petitioners' Petition for Rehearing of the Opinion dated March 14, 1997 (Appendix B, page 3a). The district court verdicts were entered on February 26, 1996 as to liability (Appendix C, page 24a) and March 12, 1996 as to damages (Appendix C, page 21a). Judgment was entered on the verdicts on March 13, 1996 (Appendix C, page 20a).

Federal jurisdiction was obtained under 42 U.S.C. § 1983. This Honorable Court has jurisdiction to review the order by Writ of Certiorari pursuant to 28 U.S.C. § 1254.

Constitutional Provisions Involved

7th Amendment to the Constitution of the United States.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

14th Amendment to the Constitution of the United States.

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives -- Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the

number of such make citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

Statement of the Case

FACTS, PHC:

In early 1989 Panther Hollow Corporation (hereinafter "PHC"), which was 50% owned by Sol Gross and his wife, purchased a 27 acre tract, located near the University area, in the City of Pittsburgh (hereinafter, "City") from the CSX Railroad for a price in excess of $1,000,000. Prior to the sale, CSX had been cited for the existing conditions on the property, years of accumulated debris, tires, abandoned cars, asphalt piles.

After the sale, on behalf of CSX and under contract to CSX, PHC remediated the conditions for which CSX had been cited. It removed the tires, abandoned cars and other debris from the site, and graded the asphalt piles as approved by the City, all under the direction of the City Bureau of Building Inspection (hereinafter "BBI"). In order to perform its work, with permission from the City Department of Public Works, (hereinafter "DPW") PHC prepared an access road, which was necessary to gain entrance to the site. No permit was required for the remediation work.

Prior to the sale, the property was a common dump. A street (Boundary Street) which ran through it had been closed due to the accumulation of debris. There was no vehicular access to the area and fire hydrants located on the site were inaccessible.

City records indicated that the CSX violations were abated by PHC's cleanup activities as of June 15, 1989, although PHC was not informed and believed it was continuing the cleanup into late July. However, in late July, PHC was informed that it should obtain a Land Operations Permit to perform additional work it was doing, leveling ("grading") the area.

During the work, prior to permit issuance, PHC had been grading the area level with permission from DPW, raising the elevation of the then impassable street (which, the City had no plans to open and whose opening the area residents opposed). In

fact, the grading was required. Initially, the BBI asked that large piles of asphalt be removed, but agreed they could be graded into the area. Unknown to DPW and BBI, the grading caused the burial of a City water line (not shown on the centralized one call system). In addition, during the work, a neighboring property was found to be discharging raw sewage on the PHC property, which was originally attributed to PHC's work, but later found to be the result of a septic system that was never connected. The sewage leak was initially reported to the Allegheny County Health Department ("ACHD") by Sol Gross.

On or about July 23, 1989, the City Director of the Water Department insisted that the land operations work stop due to the overburden on the water line. Although there is no city ordinance governing such a request, PHC stopped its work pending resolution of the problem.

On July 27, 1989, PHC applied for and obtained a City Land Operations Permit which permitted PHC to perform earthwork, not to involve more than 16,000 cubic feet of earth movement. The work under the permit was to prepare the site for a parking lot, a permitted use under the City zoning codes. However, work did not resume at that time.

Residents living near the area opposed the use of the site for a parking lot and complained to the City. Following the issuance of the permit, they became especially active. The City (City Planning Department) met with the residents on a number of occasions. During those meetings, the City promised the residents that a parking lot would not be constructed and that the residents would have an opportunity to participate in the process of determining the use to which the property could be put. However, the property was zoned for and could be used as a parking lot under the zoning ordinances. But, if more than 16,000 yards of earth were moved, a "conditional use" hearing would be required. A conditional use hearing is a public hearing and any conditional use permit required City Council approval, a political process, instead of the ordinary zoning process.

Following meetings with the residents, the City raised a number of issues pertaining to the property. The City questioned

whether the earth movement exceeded 16,000 yards. Both PHC and City employed engineers indicated that less than 16,000 yards of earth were moved.[1] Additional issues were raised by the City, such as a lack of a storm water control system, that the work of PHC resulted in a landslide, an overburden on an electric company transmission line, the burial of the City water line (and, with it, access to City fire hydrants) and lack of a storm water plan.

In addition to the foregoing, the ACHD raised questions concerning the work by PHC and insisted that the City sewer the two lots from which raw sewage was leaking onto the PHC property. PHC contended that the raw sewage was not the result of its actions and, it was later determined that the septic systems were never connected. The discharge had nothing to do with PHC's operations. In fact, it was likely that raw sewage had been leaking for years, but the general debris in the area prevented its discovery.

Between July 23, 1989 and September 21, 1989, the project was shut down. No work was performed.

On September 21, 1989, PHC representatives, including Sol Gross and his engineers, met with all of the affected Department heads of the City of Pittsburgh to discuss all of the outstanding matters (Appendix K, page 81a). At that meeting, all but one of the outstanding matters were resolved. PHC's engineers presented data indicating that (1) not more than 16,000 cubic yards of earth were moved; (2) landslides in the area were not caused by PHC (in fact, they were caused by the illegal dumping of an adjacent property owner who the City refused to cite, and PHC's work stabilized the hillside); and, (3) storm water was not a problem (recent flooding came from a lake nearby and did not result from PHC work). The minutes were prepared by representatives of City Planning.

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1 In fact, the City employed engineer was called by PHC as a witness and testified at trial as to his calculations, that were less than 16,000 cubic yards.

At the meeting PHC told the Directors that no more fill was required for the site, even though it had a permit to do so, so that that issue became moot. The meeting left one issue unresolved. The Director of the Water Department insisted that PHC either uncover the water line or install a new one at a higher elevation (which would also raise the fire hydrants). Work, consisting of grading, resumed on October 10, 1989, without objection from the City.[2]

On October 10, 1989, the Director of the Water Department wrote PHC confirming PHC's agreement to raise the water line.

On October 19 and 20, 1989, PHC applied for and was granted a temporary occupancy certificate for use of the property as a 565 car parking lot. It might be noted that at this time the ACHD, who had jurisdiction over the sewage issue, required the City to install City sewage to the homes with the defective septic systems.

On October 26, 1989, PHC confirmed to the Director of the Water Department that it would raise the water line in accord with the discussion of September 21, 1989 and on November 1, 1989, the Director of the Water Department wrote to PHC, in which he confirmed the agreement for raising the water line, that PHC would submit plans by March 1, 1990 and begin construction by June 1, 1990 (Appendix M, page 85a). Therefore, as of November 1, 1989, all outstanding matters were resolved, pending the plan submission scheduled for March 1, 1990.

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2 Despite there being no ordinance which would permit the Water Department to require PHC to install a new water line and although PHC had been authorized to level the on site asphalt and grade the area, it never objected to installing a new water line. That issue never became part of PHC's case, although the City raised it as a basis for revocation.

Also, on November 1, 1989, PHC was received a letter from BBI[3] (Appendix L, page 84a) which added conditions for use of the property as a parking lot, over and above those set out in the October 20, 1989 temporary occupancy permit. The additional items consisted of a fence around the lot, a permanent barrier around the fire hydrant (which was below grade pending the raising of the water line by PHC) and, if the lot was to be used at night, lighting. PHC registered no objection.

During this period, the residents in the area became more aggressive in their insistence that the property not be used for a parking lot, and the City was in constant communication with those residents.

On November 2, 1989, the Chief of BBI (Paul Imhoff) left the City for a meeting of the American Building Officials. The Assistant Chief, Dominick Cimino ("Cimino") became acting Chief during the Chief's absence.

On November 6, 1989, all of the affected City Department heads met with representatives of the Mayor's office. Cimino attended for BBI. Although minutes of the meeting were referenced, none were ever produced. During trial, each of the attendees testified that at that meeting, there was a "consensus" that the Land Operations Permit should be revoked. Each attendee testified he or she could not remember any specific event that transpired at the meeting.

On November 7, 1989, Cimino met with the organized group of residents and with the Director and Deputy Director of City Planning present, promised to shut the PHC project down.

On November 9, 1989, Cimino as acting Chief of BBI personally delivered a letter to PHC at the site, in which PHC was directed to discontinue all operations (Appendix N, page 87a). Cimino was accompanied by uniformed police and informed those present (PHC and its subcontractor) that if any work was initiated,

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[3] It is to be noted that the revocation of a building permit is exclusively within the authority of BBI.

all would be arrested. Despite his statement, there was no provision under the City ordinance to permit the arrest of one performing work under a revoked permit. In fact, under the ordinance, if the revocation was appealed, the revocation was to have been suspended.

There was no evidence of any cataclysmic event occurring between the September 21, 1989 meeting and the revocation letter, nor was there any evidence of any event between the November 1, 1989 letters of approval and the revocation.

The letter of revocation listed six reasons for revocation:

- Excessive overburden on two City sewers and a water line located within the fill area;

- [Fill] on a City water line, which makes useless City fire hydrants in the area;

- An excessive overburden on a Duquesne Light transmission line;

- Interfere[ence] with sewer systems of adjoining owners;

- Landslides in Panther Hollow area; and,

- Fill in a manner that would cause excessive drainage in the Panther Hollow-Boundary Street area.

The letter also gave the following reason for revoking the parking lot permit and certificate for temporary occupancy:

> Review of your Certificate of Occupancy, as well as the permit to operate a parking lot, indicates that a large portion of the parking spaces are located on Boundary Street. Accordingly, no

> permit will be issued, separate and apart from the land operations issue, until a new parking plan is submitted showing the location of the spaces.

Lastly, the letter stated:

> Presently, you have an access road at the lower end of Boundary Street, which is illegal. You are not to use this as an access until you receive a curb cut from the Department of Public Works.

On December 1, 1989, the City installed jersey barriers (large concrete highway dividers, moved by crane), to prevent all access to the site, including that by the owners.

PROCEDURAL HISTORY - STATE COURT, PHC:

On December 8, 1989, PHC appealed the revocation of the permit to the City Board of Standards and Appeals, who sustained the revocation by a decision dated January 31, 1990 (Appendix G, page 42a), that was not provided to PHC counsel until November 9, 1990. The sole grounds for sustaining the revocation was that the documents submitted were insufficient, a reason not given for revocation (this was not contained in the order, but in the hearing transcript).

PHC filed an appeal to the Common Pleas Court of Allegheny County, Pennsylvania ("Common Pleas") from the decision of the Board of Standards and Appeals. The Common Pleas Court, after a five day hearing, reinstated the permit by an order dated July 7, 1992 (Appendix E, page 27a). Although the City appealed the Common Pleas decision, it became final when the City appeal was dismissed due to mootness, following the taking of the property, as referenced hereafter (Appendix D, page 26a).

On December 20, 1989, PHC filed a Petition for Appointment of a Board of View (the method by which one

initiates the process of inverse condemnation), in the Common Pleas court (the "eminent domain" case). The petition alleged that the City's installation of jersey barriers to prevent access to the property constituted an inverse condemnation.

In response, the City filed "Preliminary Objections" [4] in which it denied that there was an inverse condemnation. The eminent domain case lay dormant until March 8, 1996, when the City withdrew its preliminary objections, which had the effect of admitting that a taking occurred as well as the facts contained in the petition.[5]

FEDERAL COURT, PHC:

On November 5, 1991, PHC and Sol Gross filed the complaint in this case, alleging violations of their rights under 42 U.S.C. § 1983 (the "civil rights case"). The Defendants included the City, individual actors employed by the City and residents of the neighborhood. The individual defendants were removed by summary judgment before trial. At trial, the issues tried were twofold, (1) that the arrest of Sol Gross was a violation of his due

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4 Preliminary Objections are the Pennsylvania equivalent of a F.R.C.P. 12 (b) motion to dismiss. In inverse condemnation cases, the objections are to sole means by which the municipality may contest the factual basis of the condemnation.

5 Following the filing of the complaint in this case, the City raised an issue of abstention, which the district denied in light of the City's objections to the Petition for Board of View, in which it contended that the procedure was not applicable to the instant case. The Third Circuit, *sua sponte*, questioned whether Williamson County Regional Planning Commission v. Hamilton, 473 U.S. 172 (1985). However, the federal claim of PHC was a due process, not a taking claim.

process (see below); and, (2) that the permit revocation, followed by the blockade, was a violation of due process. No taking claim was made.[6]

The civil rights case was bifurcated between liability and damages and tried before a jury. The verdict was in favor of PHC on the issue of liability. The jury then awarded PHC damages of $565,824. On appeal, the Third Circuit reversed, holding that the verdict was against the weight of the evidence (Appendix, page 13a).

However, before the verdict on damages, the matter took a strange twist.

The jury reached a verdict on liability on February 26, 1996 (Appendix C, page 24a). After a delay of a week, testimony resumed, on damages and was complete as of March 8, 1996. The matter was scheduled to be submitted to the jury for verdict on March 11, 1996.

On March 8, 1996, at approximately 4:00 P.M. (a Friday), the City withdrew its preliminary objections to the eminent domain case. The withdrawal of the preliminary objections had the effect of admitting the taking claim in state court. When Court reconvened on the 11th, for submission to the jury, counsel for the City informed the Court of its action, which chagrined the Court. The City then took the position that damages would be limited to

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6 There was also a procedural due process claim that the hearing before the Board of Standards and Appeals was violative of due process, in that the basis for revocation set forth in the November 9, 1989 letter was not addressed by the Board. Rather, the decision of Cimino was upheld on grounds never raised, that the PHC application was insufficient. In addition, PHC complained because the Board included Cimino as a member and he participated in the decision of the Board to uphold his own decision as Acting Chief. This issue, along with the jersey barrier blockade, was not tried. The Court determined it would only try those issues if found against PHC on the arbitrary revocation issue.

losses of 21 days, from November 9, 1989 (the date of revocation) to December 1, 1990 (the date of the installation of the jersey barriers). The Court was of the view that its jurisdiction could not be ousted and the case went to the jury without modification of the jury instructions. This was commented upon by the Third Circuit (Appendix, page 18a), although the City, now that the verdict in the District Court has been reversed, takes a different position as seen by its appeal from the Board of View's decision awarding damages to PHC (Appendix J, page 79a). The City now posits that the Board of View was in error in determining that PHC relinquished possession on December 1, 1989, which has the effect of disputing damages for the delay in payment (Appendix J, page 79a).[7]

After the City appealed the district court judgment, PHC filed a Motion to Dismiss Appeal and for Sanctions (Appendix I, page 61a) concerning the City's actions. The gravamen of the Motion, was that the admission by the City of the taking in the eminent domain case was an acknowledgement of the facts contained therein. That admission contradicted the City defense and justified dismissal of the appeal. Moreover, the verdict could not be against the weight of the evidence if the City acknowledged the facts contained in the Petition for Appointment of Board of View. Lastly, the actions of the City were violative of F.R.C.P. 11 and F.R.A.P. 38.

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[7] We call this to the Court's attention, because the City has taken different positions on different issues at different times. For instance, it presented testimony in the instant case that the value of the property was $2,000,000. Yet, in the state court proceedings, it sought to disavow that position. The state court held the City judicially estopped from disputing that value. Thus, when the City believed it could limit damages in the federal proceeding to 21 days, it admitted the taking of the property. However, when the Third Circuit reversed, the City no longer posits that the damages are limited to 21 days.

At the close of the Plaintiffs' case, the City moved for a compulsory nonsuit. No motion was made following the close of all evidence. Following trial, a motion for judgment as a matter of law or a new trial was filed by the City (Sol Gross filed a motion to amend the verdict).

FACTS, SOL GROSS:

On September 18, 1989, Sol Gross (co-owner of the stock of PHC) was stopped and charged in a summary proceeding, with performing work without a permit; although George Fisher, the employee of BBI who cited Sol Gross was acting out of his jurisdiction and had no information concerning whether a permit had been issued. The BBI employee testified he was instructed by the Chief of BBI to cite Sol Gross. The Chief of BBI had personally issued the permit and was aware that a permit had been issued. If the employee had looked in the file before issuing the citation, he too would have been aware that a permit had been issued. He acknowledged that he issued the citation only on direction from the Chief. There was no contrary evidence.

As a consequence of the citation, Sol Gross had to post a bond and attend a hearing before a District Magistrate. He was found not guilty, upon proving that the permit was issued.

PROCEDURAL HISTORY, SOL GROSS:

Sol Gross joined in the § 1983 complaint, alleging his civil rights were violated by the arrest and prosection. He testified that he was anguished by the arrest and suffered emotional trauma. His wife testified on the emotional distress issue. Other than the testimony of the BBI employee, George Fisher, who admitted the foregoing facts, there was no other testimony on this issue.

At trial, the jury found Sol Gross' civil rights were violated (Appendix C, page 24a). However, in the damages portion of the trial, the jury awarded him no damages (Appendix C, page

21a). Immediately following the jury verdict, and before the jury was discharged, his counsel approached the bench and requested that the Court direct the jury to enter an award for nominal damages, at the least. The District Court refused.

On appeal, the Third Circuit affirmed, suggesting that the jury might have reached a "compromise verdict when it resolved the liability issue in favor of Gross". In addition, the Court found that the "issuance of a citation which was withdrawn--seems to us to be so inconsequential that, ... the verdict was not flawed." (Appendix B, page 17a)[8]

THE TRIAL

The trial consumed approximately 21 days of testimony. The witnesses included Dominick Cimino, the Assistant Chief of BBI; Paul Imhoff, the Chief of BBI; Daniel Feeney, the BBI official who supervised the cleanup of the PHC property; George Fisher, the BBI officer who arrested Sol Gross; Mary K. Conturo, the then City Solicitor; Joseph Sabino Mistick, the then Executive Secretary from the Mayor's office, Fred Reginella; the Director of Engineering; Alex Sciulli, the Director of the Water Department; Jane Downing and Maureen A. Hogan, formerly Director and Planner from the City Planning Department; Larry K. Stefl, a representative of ACHD; Thomas F. Easton, the City employed engineer; Sol Gross, from PHC; Anthony Berardi, the person in charge of the on site land operations; various building inspection officials; Dr. William Whittaker, an expert as to earth movement; and Betty Murphy, the PHC employed engineer. There were a number of other witnesses, both on liability and damages. Over 100 Exhibits were introduced.

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[8] The citation was not withdrawn. The BBI inspector who issued the citation did not appear at the hearing and Sol Gross presented evidence that he had a permit.

As a consequence of the voluminous record, we do not include all of the testimony and exhibits from the record. The testimony will be summarized for each of the revocation reasons listed in the letter of November 9, 1989 (Appendix N, page 87a), which is what should have been before the district court and the Third Circuit.

At the outset of the trial, a Motion in Limine was presented, relative to the findings of Judge Gallo of the Common Pleas Court, that such findings should preclude contrary evidence. The trial court was somewhat equivocal in granting the motion, holding the City could not argue facts already determined by the Common Pleas Court, but did let the City argue those facts on the ground that they were supportive of the City's good faith belief that PHC was guilty of the complaints listed in the revocation letter. As to each of those items:

- Excessive overburden on two City sewers and a water line located within the fill area.

This was resolved by an agreement, memorialized in the letter of November 1, 1989, between PHC and the City, for the replacement of the water line, and the agreement provided that the drawings were not due until March 1, 1990, 4 months following revocation; and, the work was not to start until June 1, 1990. So far as the overburden on the sewers, testimony was that a minuscule amount of fill was brought on the site. What actually occurred was the removal of debris and a grading of the existing piles of dirt and asphalt as PHC was directed by the City.

- [Fill] on a City water line, which makes useless City fire hydrants in the area.

This is the same water line replacement agreement referenced above. When the water line was raised, the fire hydrants would be raised as part of the line.

- An excessive overburden on a Duquesne Light transmission line.

Duquesne Light informed the parties, after inspection, that the overburden was not a problem. In fact, during the Common Pleas trial, Cimino testified about this problem, not being aware that the letter from Duquesne Light was in his file.

- Interfere[ence] with sewer systems of adjoining owners.

The City engineer, Fred Reginella and John L. Skutski, an employee of the company employed by the City to install sewage on the subject lot, testified that the septic system was never connected. Skutski testified that the area was undisturbed by Sol Gross' equipment. Sol Gross testified that his work did not involve the area near the subject houses. Sol Gross testified that he notified ACHD of the leaking sewage, because it was coming on his property.

- Landslides in Panther Hollow area.

Exhibits were introduced that both PHC's engineer and the City engineer concluded that the land operations of PHC did not cause the landslides. Moreover, PHC's engineer's reports indicated that the PHC work stabilized the hill. Sol Gross and his excavator, Anthony Berardi, testified that no work was done on the affected hillside. Evidence was introduced that an adjoining landowner dumped debris on the hillside, which did affect it, as well as water run off from a City street.

- Fill in a manner that would cause excessive drainage in the Panther Hollow-Boundary Street area.

PHC's engineer testified that there was no excessive drainage and the City engineer's report indicated that drainage was not a significant concern at the time.

> Review of your Certificate of Occupancy, as well as the permit to operate a parking lot, indicates that a large portion of the parking spaces are located on Boundary Street. Accordingly, no permit will be issued, separate and apart from the land operations issue, until a new parking plan is submitted showing the location of the spaces.

First, the drawings submitted by PHC did not show parking on the City street. Secondly, a memorandum prepared by the attorney for the City who actually tried the case, evidenced that there was no ordinance or other proscription from use of a "paper" street for parking.

> Presently, you have an access road at the lower end of Boundary Street, which is illegal. You are not to use this as an access until you receive a curb cut from the Department of Public Works.

The former head of surveys for the City testified that he was present when PHC was authorized to install the access road. Moreover, there was correspondence indicating that PHC was authorized to install the access road.

In addition, PHC presented a great deal of evidence that the City actions were pretextual. For instance, Cimino, the Assistant Chief of BBI who signed the revocation letter, could not tell the jury how or who helped him write the letter, finally settling on a former City Solicitor despite previous testimony that he did not recall. He also testified that he had never visited the site before November 9, 1989. Prior testimony was introduced from him and Mr. Feeney (the on site inspector) in which Cimino testified he had reports from his inspector that the work was causing problems. Not only did he not have reports, but the inspector testified that all

of the work was satisfactory to the City. The Common Pleas Court and the jury in this case found Cimino's testimony unbelievable.

The Chief of BBI testified that City Planning would hold up projects if they could not have a say in what was being done. even if not provided for in the ordinances. He testified that City Planning appeased residents, regardless of ordinances. He also testified, that it was normal, if there was a severe problem, to issue a stop work order, but not a revocation.[9]

A City Planning memorandum was presented that the property was valuable and would be developed "with or without Mr. Gross' cooperation." Additionally, a City Councilman testified as to a secret meeting during which representatives of the City and the University of Pittsburgh met and discussed uses for PHC's property. Another witness, Alan Gochnour testified that a City Planning employee expressed dismay that PHC bought the property and indicated that permits would not be given, regardless of the ordinances.

The Mayor's Executive Director testified that the City was especially concerned over inaccessibility to the fire hydrants (which were located in a depressed area of the site, previously inaccessible), but was at a loss to explain how access could be obtained once the jersey barriers were placed by the City, nor how fencing in the property (as requested by BBI) would help.

The engineer employed by the City was called by PHC and testified that PHC did not move more than 16,000 cubic yards of earth. Numerous exhibits were introduced that the City was seeking to recalculate the quantity, using different methods, to get over the 16,000 cubic yard level so as to require a public meeting as requested by the residents and promised by the City. In fact, the excavator who did the actual earth moving was called and testified

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The difference in the context of this case was significant. If a stop work order, the permit would remain effective and work could start once the problems were resolved. Revocation required a new application, just what City Planning and the residents desired.

that the total earth moved was less than 9,000 cubic yards. On cross examination, he produced a log book in which he recorded daily volume (and, to reinforce his credibility, that was the basis of his charges to PHC). PHC's engineer testified that the City was given that information at the September 21 meeting. Despite all of this, the Third Circuit (Appendix, page 8a), commented that Daniel T. Sentz, a Planning Department engineer "eyeballed" the site and concluded more than 16,000 cubic yards of earth were moved (testimony was he had not even seen the site before the work was completed). With this, the Third Circuit evidently concluded that the evidence was overwhelming that PHC violated its permit.

Despite the clear language of the revocation letter, exhibits were introduced indicating different reasons for revocation, such as Cimino's testimony before City Council in which he characterized the revocation as due to failure to file "subsequent" plans and reports (the same reason as the Board of Standards and Appeals, on which he sat), and the Director of City Planning, who informed City Council that the revocation was a "response" to meetings with various residential groups.

To reach its decision to grant a new trial, the Third Circuit was required to balance the testimony.

Argument

I. The Third Circuit erred when it held that Sol Gross was not entitled to nominal damages (or any damages) for the violation of his civil rights by an arrest that was found to be arbitrary and capricious.

In Carey v. Piphus, 435 U.S. 247 (1978), this court held that a plaintiff in a civil rights action is entitled to nominal damages even without proof of actual harm. This case was followed in Farrar v. Cain, 756 F.2d 1148 (5th Cir. 1985) and in this very circuit, in Morrison v. Stepanski, 839 F.Supp. 1130

(M.D. 1993). The Third Circuit ignored these cases and refused to reconcile the verdict.

II. The Third Circuit violated the 7th Amendment when it substituted its conclusions for those of the jury as to factual disputes.

Prior to considering the testimony, one has to isolate the issue. Evidence at trial indicated that a resolution of the problems previously complained of occurred on September 21, 1989. The evidence is overwhelming, consisting of minutes from the meeting, followed by PHC resuming work without objection by the City and the memorialization of the agreement to replace the water line. In addition, the City issued temporary occupancy and parking permits to permit operation of the lot only 2 weeks before revocation. The remaining work to be done was minimal and completely unrelated to the revocation letter, i.e. installing a fence, a barrier around the fire hydrant (contradicting the testimony of the Executive Secretary as to the need to access the hydrant) and lighting if the lot were to be used in the evenings.

No new problems arose after the September 21, 1989 meeting and, certainly not after the November 1, 1989 Water Department agreement and the BBI letter for conditions precedent to opening the parking lot. However, there was ample evidence about heightened neighborhood pressure of City personnel to revoke the permit, and political activity among the politicians in the mayor's office. The dates of residential pressure on the City coincide with the City's actions involving PHC.

The jury was justified in reaching its decision. The Third Circuit violated the 7th Amendment when it substituted its analysis of the testimony for that of the jury. To reach that issue, the Third Circuit had to ignore its own decision in Yohannon v. Keene Corp., 924 F.2d 1255 (3rd Cir. 1991) which diverges from holdings in other circuits.

Moreover, the Third Circuit considered matters that were not the basis for revocation. For example, page 3, noting that "Panther Hollow misrepresented that the property was not in a

landslide prone area" despite testimony that the application on which the statement was made was filled in by an employee of City Planning. Moreover, that work was in a landslide prone area was not a basis for revocation.

The Third Circuit stated that ACHD began investigating the sewage discharge on complaints from neighbors, when Mr. Gross testified he called ACHD.

The Circuit acknowledged that PHC contended the discharge was onto its property, but then stated that "yet Panther Hollow refused to clean up the discharge." It was not the discharge that needed cleaning, but the septic systems that needed connected. Why would PHC have a duty to clean someone else's mess? It was the City that was required to sewer the houses that were leaking on to PHC's property. In fact, the ACHD did cite the City and the City, at no charge to the residents, did install sewage (over a right of way given gratis, by PHC).

The Circuit stated that the state DER cited PHC for violations of the State Stormwater Act, and that PHC "failed to take action." First, it was for the state to enforce the act, and second, Mr. Gross testified that he did resolve the differences. No witness from DER was presented to support the City. How could PHC dispute state claims made by the City? If the state sought to enforce its laws, PHC would have been entitled to due process and a hearing. There was no such provision for the City to hold hearings on state (or, County) laws.

The Circuit stated that the City was bound to "follow the County's direction to take action to stop the discharge of sewage". If that was true, the remediation was the result of the County citation against the City, that the City had to provide sewage access, septic systems not being permitted. PHC could do nothing to remediate discharge from a neighboring property. The City could require the offending party to remediate, which it did not. Instead, it provided sewage access. This was not a PHC responsibility. PHC did not have the power of eminent domain.

The jurors viewed the property and could judge for themselves whether the complaints were reasonable (a tour of the property was taken prior to the start of testimony). The jurors

were made aware that through the date of trial (1996), the land had sat idle. Surely, they could see that use of the land for a parking lot would not have been more detrimental to the area than the idle land. The City took no action to remediate what the Circuit referenced as "the evidence overwhelmingly supports the City's contention that it revoked the permits to protect public safety." If that had been true, then the City could show some evidence that it did something or that it caused someone else to do something to remediate these life threatening situations.[10]

The fact that the City did nothing following revocation for over 7 years, was compelling evidence to the jury that the problems were pretextual. Combined with other testimony regarding the City's plans for the property, the evidence was overwhelming. There was no evidence of City work to comply with the State Stormwater Act of which the Circuit spoke. All in all, there was nothing to support the Circuit's conclusions, let alone, to justify overturning a jury verdict.

The 7th Amendment is quite clear, that the jury verdict is sacrosanct, and cannot be reversed, other than as common law.

The "common law" is that as it existed in 1791. Suits at common law include new forms of action, such as civil rights actions.

The grant of a new trial, when the trial court substitutes its own judgment for that of the jury, is an abuse of discretion. So too, when the appeals court substitutes its judgment for that of the jury, Lewin v. Metropolitan Life Insurance Company, 391 F.2d 608, reh.den. (3rd Cir. 1968).

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10 As indicated, the only thing done was to provide sewage to the offending landowners, which was the City's responsibility. No issue was ever raised that PHC had any responsibility for the problem or, that it should bear the cost. No evidence was introduced indicating that the problems of which the City spoke were dealt with in any way following revocation.

While there are cases that hold that a court can require the reexamination of evidence by the means of a new trial, Home Ins. of N.Y. v. Tydol, Inc., 157 F.2d 851 (1946), the appellate court is limited to issues of law, Mutual Benefit Health & Accident Ass'n. v. Bowman, 175 F.2d 856 (8th Cir. 1938). Because there was no motion challenging the sufficiency of the evidence to sustain a judgment in favor of PHC, made at the close of the case, and the Court made no special findings, there is no jurisdiction to reexamine the facts, only the law.

While a motion for directed verdict or for judgment n.o.v. raises only a question of law, a motion for new trial is:

> addressed to the trial judge's discretion .... The exercise of his discretion is not ordinarily reviewable on appeal, although a failure to exercise discretion, or an abuse of it, may be corrected." Marsh v. Illinois Cent. R. Co., 175 F.2d 498, 500 (5th Cir. 1949).

This court, in Lavender v. Kurn, 327 U.S. 645 said that "[o]nly when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

In the instant case, the Third Circuit stated: "While the City did move for judgment as a matter of law at the end of Sol Gross and Panther Hollow's case, we cannot find that the court erred in denying that motion." (Appendix B, page 12a). If that is true, then PHC presented a prima facie case. The City presentation of contrary evidence does not change the situation to one in which the verdict was against the "overwhelming weight of the evidence." (page 4a) In fact, the Circuit gave its reason for reaching that conclusion:

> The city argues that given the outstanding DER citations and the findings of the Allegheny County Health Department, it is legally untenable that the jury could have found that the City acted in an

> arbitrary and irrational manner in revoking Panther Hollow's permits. (p.13).

However, neither of those reasons were given for the revocation. They did not appear on the letter. There was no testimony from any representative of the DER as to the status of the citations, although it was evident that as of the date of the trial, 5 years later, no action had been taken by PHC, the City or DER. The same was true as to ACHD, except that its representatives testified. However, the major citation, for the sewage, as discussed, was something that only the City could remediate. Since when does PHC have the duty, let alone the right, to enter onto someone else's land and put in a sewage system? The jury could easily find that the lack of evidence of remediation in the 7 years following the shut down was proof positive that the claims were pretextual.

The end result is the Third Circuit substituted its own views for that of the jury in violation of the 7th Amendment.

We recognize that questions of fact or applications of fact to legal issues are not usually addressed by this Court. However, the need for a clear direction to the Circuits to give respect to jury verdicts is important. The Constitution must be obeyed.

CONCLUSION

In conclusion, the Petitioner respectfully requests this Honorable Court to grant the within Petition for Writ of Certiorari and to reverse the decision of the Courts below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 96-3242 and 96-3267

SOL GROSS, an individual;
PANTHER HOLLOW CORPORATION

v.

CITY OF PITTSBURGH,

Appellant in No. 96-3242

SOL GROSS, an individual;
PANTHER HOLLOW CORPORATION

v.

CITY OF PITTSBURGH,

SOL GROSS and PANTHER
HOLLOW CORPORATION,

Appellants in No. 96-3267

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 91-01895)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges

The petition for rehearing filed by the appellees, Sol Gross and Panther Hollow Corporation, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

_____

Circuit Judge

DATED: APRIL 11, 1997

APPENDIX B

12109C.AP1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3242 and No. 96-3267

SOL GROSS, an individual;
PANTHER HOLLOW CORPORATION

v.

CITY OF PITTSBURGH,

Appellant in No. 96-3242

SOL GROSS, an individual;
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v.

CITY OF PITTSBURGH,

SOL GROSS and PANTHER HOLLOW CORPORATION,

Appellants in No. 96-3267

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 91-01895)
District Judge: Honorable William L. Standish

Argued February 11, 1997

BEFORE: GREENBERG, COWEN, and MCKEE, Circuit Judges

(Filed: March 14, 1997)

OPINION OF THE COURT

GREENBERG, Circuit Judges.

Appellant, the City of Pittsburgh, appeals from the district court's order denying its motion for judgment as a matter of law or to amend judgment and its alternative motion for a new trial. The City argues that there was insufficient evidence to prove that the City acted in an arbitrary or irrational manner in revoking appellees Panther Hollow Corporation and Sol Gross's land operations, occupancy and parking lot nermits in violation of 42 U.S.C. 5 1983. In addition, the City contends that the district court made errors with respect to issues relating to damages against it. Panther Hollow and Gross, a shareholder in Panther Hollow, cross-appeal, claiming that the district court erred in instructing the jury on the croper method of determining damages and made other trial errors as well. In addition, Gross contends that in view of the jury's conclusion that his civil rights were violated, he is entitled to an award of nominal damages and that the district court erred in denying his post-trial motion to amend the judgment to include nominal damages. We have jurisdiction pursuant to 28 U.S.C. S 1291.

Because we conclude that the liability verdict in favor of Panther Hollow was against the overwhelming weight of the evidence, we will reverse and order the district court to grant a new trial on all issues in Panther Hollow's claim against the City. This disposition moots the balance of the City's appeal as well as the cross-appeal, except to the extent that Gross is seeking nominal damages. To that extent we will affirm.

I. FACTUAL AND PROCEDURAL HISTORY[1]

Panther Hollow bought the Pittsburgh property involved in this case from CSX Railroad in the spring of 1989. The property was covered with debris and illegally dumped materials and had

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[1] Panther Hollow provided this court with several pages of citations to the record in its brief. We have reviewed the materials to which the citations refer and where we were able to determine how these materials support Panther Hollow's position, we have considered them in this disposition.

been in this condition for some years. At the time of Panther Hollow's purchase, there was a citation from the City's Bureau of Building Inspection ("BBI") outstanding against CSX, requiring it to clean up the accumulated debris on the property. In May 1989, after the sale, CSX, which apparently retained the obligation to clean the property, contracted with Ace Demolition Co., which Gross and his brother-in-law owned, to do the clean-up work. Ace completed the work on June 15, 1989, and at that time Ace, acting for Panther Hollow, commenced substantial land operations on the property without applying for a required permit.

On May 16, 1989, Panther Hollow applied for a permit to build a parking lot on the property. In its application, Panther Hollow misrepresented that the property was not in a landslide prone area. App. at 3089. This misrepresentation became relevant because of the occurrence of later landslides.

On or about July 20, 1989, after complaints from neighbors, the City learned that Panther Hollow was causing the hauling of fill onto the property without a permit. Following a warning from BBI, Panther Hollow stopped the illegal hauling. Panther Hollow applied for a land operations permit on July 27, 1989, which it received on July 28. In its permit application, Panther Hollow represented that a special inspector would survey the property, inspect the land operations, report weekly and make certain that the operations were being conducted in accordance with the land operations application and with applicable law. However, the special inspector made no inspections and filled no reports, thus failing to comply with section 1009.06 of the city's building code. See br. at 22-23.

In late July 1989, in response to neighborhood complaints, the Allegheny County Health Department began to investigate Panther Hollow's activities and discovered that two sewage systems of adjoining property owners were damaged and disrupted, app. at 2947, 2981, causing raw sewage to discharge on to the property of both neighbors and Panther Hollow. There was a dispute as to whether the systems were on property belonging to Panther Hollow or the neighbors, but there was no dispute as to the discharge. Yet Panther Hollow refused to clean up the discharge. App. at 2918, 2982, 2981. The Health Department directed the City to take appropriate actions to terminate the

violations to the County Health Code. At that time the County Health Denartment raised the following questions regarding the activities being conducted on the land, and asked the City to respond:

1) Does Mr. Gross have all the necessary permits?
2) Is the filling operation being conducted in a controlled manner?
3) Is the hillside stable, and will it remain stable?
4) Is adequate fire protection available for the homes adjacent to the site?
5) Will the excavation have an impact on the bridge supports in the valley?
6) Is there a storm water management plan or erosion control plan in place?

App. at 2947.

The County inspection further determined that Panther Hollow was creating an excessive overburden on the property and was otherwise in violation of County and State statutes and regulations. App. at 2952, 3498. Among other things, the hillside under a nearby city street was sliding, endangering the street and homes on the hillside. Responding to a referral from the County Health Department, and, in all likelihood, an article which appeared in the Pittsburgh Gazette on July 27, 1989, the State Department of Environmental Resources ("DER") inspected the property on July 27, 1989, and cited Panther Hollow and Ace Demolition for violations of the State Stormwater Act and statutes and regulations regarding erosion and sedimentation controls. Nevertheless, Panther Hollow failed to take action to abate the violations. Instead, as we have indicated above, on July 27, 1989, Panther Hollow applied to the City for a land operations permit which it received the following day. As earlier stated, Panther Hollow previously had applied for and received a parking lot permit.

After the issuance of the land operations permit, the City received still more neighborhood complaints. In addition, on October 6, 1989, the County Health Department notified the mayor that Ace Demolition had violated the Pennsylvania clean Streams

Law and the Pennsylvania Sewage Facilities Act. App. at 2949. The County Health Department further advised the mayor that as a direct result of the excavation activities, the sewage disposal systems on the property had malfunctioned, resulting in a discharge of sewage onto the land. The County Health Department also informed the City that the discharge of sewage "pose[d] a potential danger to the health of the public . . . and constituted a health hazard under the Local Health Administration Law, Act 315." App. at 2949.

During this same period, the Director of the City Water Department warned Panther Hollow that Panther Hollow had buried a City water line under an excessive amount of fill. Though it agreed to relocate the line, app. at 3138, Panther Hollow took no actions to effectuate the relocation. The Water Department also found that Panther Hollow had buried manhole covers providing access to a storm sewer and had placed ten to twelve feet of fill around a fire hydrant, preventing access to the hydrant. And again, though Gross seemed to agree to install a new water line to remedy this, no action was taken. App. at 3176. In response to continuing neighborhood complaints, various city officials visited the propertv. The County Health Demartment finally recommended to the Citv that the permits be revoked. Although a meeting was held on September 21, 1989, in an attempt to resolve the dispute between Panther Hollow and the City, the parties did not reach a resolution.

Despite all of the foregoing, on October 20, 1989, Panther Hollow applied for a temporary occupancy permit to open its parking lot and obtained it the following day. Though the permit called for a signature by a BBI senior inspector, the chief of BBI signed it. On October 23, 1989, a representative of the City Planning Department inspected the property. App. at 1801. He identified violations of State statutes and regulations and County health regulations, and noted that Panther Hollow had moved more than 16,000 cubic yards of material, which required a conditional use application. App. at 2963, 3499. The following day, City and County employees held a joint meeting to discuss the health hazard created by Panther Hollow as a result of the excavation work and addressed the following problems:

1. Sewage discharges from septic systems [on the land had] resulted from the excavation activities.....;
2. Manholes for the City of Pittsburgh sewer lines in the area are now below the new grade provided by Mr. Gross's filling operations [and need to be) extended to make them accessible;
3. Fire hydrant(s), and possibly valves, for Pittsburgh public water lines have also been placed below the new grade level and must be raised to make [them] accessible at the new grade level;
4. No storm water management system appears to be in place; [ ] substantial alteration of the natural hillside has been made, raising concerns (about the stability of the hillside]; [Gross' activities are in violation of] the Erosion Control Regulations of the DER [and include] failure to provide an Erosion and Sedimentation control Plan, [failure) to stabilize critical areas, and allowing sediment to flow into waters of the Commonwealth.

App. at 2951-52.

After the meeting, Daniel T. Sentz, an environmental engineer and representative of the City Planning Department who was present at the meeting and had inspected the site, evaluated the situation and concluded that all permits granted to Panther Hollow should be revoked and all work stopped because of Gross's "excessive exceedence of what he was permitted to do. App. at 2963. In his October 25, 1989 memo to members of the City Planning Department, Sentz noted that Gross created a health hazard by excavating drainage fields of two septic systems, triggered slope movement by excavating and removing vegetation from the hillside, brought in more than the allowable 16,000 cubic yards of fill, and excavated up to the property lines which is not permitted by City regulations. Id. at 2962-64. He concluded that although BBI "seem(s] to feel Gross is doing something good for the City . . . . Gross's actions have been physically, socially, and legally detrimental to the City. Credibility in [the City's] approval and

inspection procedures has suffered significantly on this project." Id. at 2964.

Following a meeting on October 24, 1989, attended by both City officials and representatives of the County Health Department, a recommendation was made to the mayor to have Panther Hollow cease all activity on the land until all public health and safety issues on the land had been addressed. On November 6,1989, City officials from the various departments involved in the matter met to discuss revocation of the permits.

At the end of the discussion, they reached a consensus and all present agreed that the permits should be revoked. A recommendation to this end was sent to the Mayor by letter dated November 9, 1989. App. at 2951. Also by letter dated November 9, 1989, the City revoked the parking lot, land operations and temporary occupancy permits, stating as reasons the following "dangerous" conditions:

a) . . . excessive overburden on two City sewers and a water line located within the fill area;
b) [fill] on a City water line, which makes useless City fire hydrants in the area;
c) . . . excessive overburden on Duquesne Light transmission;
d) interferes with sewer systems of adjoining property owners;
e) . . . caused landslides in the Panther Hollow area;
f) . . . fill [ ] placed in a manner that will cause excessive drainage in the Panther Hollow-Boundary Street area.

App. at 3157. On this same date, a community group, Oakland Directions, Inc., held a meeting to discuss the Panther Hollow development. The minutes of this meeting reflect that several city representatives addressed the concerns expressed by community residents and informed the residents that Gross's permits had been revoked and would not be reinstated until he submitted a plan to correct the landslide, drainage, and utility problems and complied with other documentation procedures required by the City. App.

at 3159-62.

It must not be thought that only the City saw a problem on the property. In a remarkable letter dated November 22, 1989, GeoMechanics, Inc., a firm emoloyed by Gross, wrote BBI discussing conditions on the property. App. at 3176-78. While GeoMechanics understandably sought to minimize the seriousness of the conditions and shift blame away from Gross, still it indicated "that dangerous and hazardous conditions have not been created to the degree indicated by the City of Pittsburgh." Thus, even Gross's representative saw that there were serious problems with the property.

Following revocation of the permits, Panther Hollow appealed the revocation to the City's Board of Standards and Appeals which sustained the revocation. Panther Hollow then appealed that decision to the Court of Common Pleas which reversed and ordered reinstatement of the permits. The City then appealed the decision to the Commonwealth Court. The issues on appeal included whether Panther Hollow's appeal to the Court of Common Pleas was timely, and whether the City's revocation of the permits was justifiable. After remand to the Court of Common Pleas on the issue of timeliness, which remand determined that the appeal had been timely, the City appealed again to the Commonwealth Court. However, this appeal was dismissed because the claim for restoration of the permit became moot when the City placed barriers around a portion of the property, allegedly to ensure public safety.

Following placement of the barriers, Panther Hollow filed a petition in the Court of Common Pleas for the appointment of a board of viewers alleging a de facto taking resulting from placement of the barriers. The City filed preliminary objections to the petition, and no further action was taken by either party until March 8, 1996, four days before the damage verdict in the federal case, when the City withdrew its preliminary objection and effectuated a de facto taking of the property. The taking related back to December 1, 1989, 22 days after the permits were revoked. The board of viewers hearing was scheduled for December 12, 1996. The district court did not allow any aspect of the de facto taking case to be presented to the jury, because as of March 8, 1996, only closing arguments and the charge and jury

verdict on damages remained at trial.

Panther Hollow and Gross filed this action under 42 U.S.C. S 1983, on November 5, 1991, alleging that the City violated their civil rights by wrongfully, arbitrarily and capriciously revoking the land operations, temporary occupancy, and parking lot permits. In addition, Gross charged that his rights were violated by the wrongful issuance to him of a citation for working without a permit. The complaint as originally filed named as defendants various City officials, the City, and several neighborhood groups and residents. The district court granted summary judgment in favor of the private defendants, and the suit against the individual city defendants was dismissed because they were acting in their official capacities. The district court also granted the City summary judgment as to Gross's claims which involved a deprivation of his constitutionally protected interests arising out of the City's conduct because the court determined that Gross was not the true owner of the property, but instead merely held the deed for Panther Hollow and thus had no constitutionally protected liberty or property interest in the land. However, because the court found issues relating to Gross's claims of deprivation of a liberty interest due to malicious prosecution, abuse of process and harassment, it denied the City's motion for summary judgment as to that claim.

The case was tried before a jury from January 9, 1996, through March 12, 1996. Following the close of the plaintiffs' case, the City moved for judgment as a matter of law, which the court denied. In a bifurcated trial, a jury found that the City had violated the civil rights of both Panther Hollow and Gross, later awarding Panther Hollow damages of $565,824, but awarding no damages to Gross. The jury also found that the fair market value of the property was $2,500,000 with the permits in effect and $2,000,000 without the permits in effect.

Following the trial, the City filed a motion for judgment as a matter of law or, in the alternative for a new trial, which the district court denied. Panther Hollow and Gross filed a motion to amend judgment or for a new trial, claiming that the district court erred in instructing the jury on the issue of damages which the district court also denied. All parties appeal. However, the City has not appealed the judgment in favor of Gross on liability as the

jury determined that he sustained no damages.

II. DISCUSSION

The City argues that given the outstanding DER citations and the findings of the Allegheny County Health Department, it is legally untenable that the jury could have found that the City acted in an arbitrary and irrational manner in revoking Panther Hollow's permits. We agree. Nevertheless, as Panther Hollow correctly points out, because the City failed to move for judgment as a matter of law at the end of all of the evidence, we cannot now direct the entry of a judgment in its favor. See Yohannon v. Keene Corp., 924 F. 2d 1255, 1262 (3d Cir. 1991). While the City did move for judgment as a matter of law at the end of Gross and Panther Hollow's case, we cannot find that the court erred in denying that motion.

However, after the jury verdict, the City did make a motion for a new trial which in most circuits would be proper, as "a litigant may move for a new trial under Rule 59 based on the overwhelming evidence contrary to the verdict without ever previously raising such an objection." Pulla v. Amoco Oil Co., 72 F.3d 648, 656 (8th Cir. 1995). In this circuit, however, a party ordinarily may not move for a new trial on the ground that the verdict is against the weight of the evidence without first moving for judgment as a matter of law at the end of all of the evidence. See Yohannon, 924 F.2d 1261-63. But in this case we will not apply that rule as Panther Hollow does not contend that it opposed the City's motion for a new trial on the procedural ground that the City did not move for judgment as a matter of law at the end of all of the evidence. In fact, Panther Hollow does not even raise that point in its brief on this appeal. Br. at 33-36. Indeed, Panther Hollow cites Pulla v. Amoco for the standard of review in considering the district court's order denying the motion for a new trial and it is that very case, contrary to Yohannon, which Panther Hollow does not cite, that indicates that a party may move for a new trial on the grounds that a verdict is against the weight of the evidence without having raised that issue at the trial. Finally, Panther Hollow points to nothing in the record to support a conclusion that the district court denied the motion for a new trial

on the ground that the City did not move for judgment as a matter of law at the end of all of the evidence.

Clearly the verdict was against the overwhelming weight of the evidence because there was no basis on which the jury could have found that the City deprived Panther Hollow of its substantive due process rights under section 1983 by arbitrarily and irrationally revoking its permits. Consequently, the district court abused its discretion by denying the motion for a new trial and we will remand the case f or a new trial. Dunn v. Hovic, 1 F.3d 1362, 1364 (3d Cir. 1993). Of course, our opinion does not preclude the City from moving for summary judgment on the remand.

To prevail in a section 1983 action, a plaintiff must establish "(l), that the conduct complained of was committed by a person acting under color of state law and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1141-42 (3d Cir. 1990) (citation and internal quotation marks omitted); see Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir.), cert. denied, 116 S.Ct. 165 (1995). Panther Hollow and Gross argue that the City's conduct deprived them of their substantive due process rights. Substantive due process protects citizens from arbitrary and irrational acts of government. Rogin v. Bensalem Township, 616 F.2d 680, 689 (3d Cir. 1980). To prove a substantive due process violation a plaintiff must prove: (1) a government's actions were not rationally related to a legitimate government interest, or (2) a government's actions were motivated by bias, bad faith or improper motives. Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991).

Without defining those state-created property interests protected by substantive due process, we held in Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989), that "[i]t is apparent . . . that, in this circuit at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." In Reich the plaintiff had been hired by the county to investigate and prosecute the county controller. When he completed the assignment and submitted the bills, payment required the controller's approval. When the approval

was not granted, Reich sued. We affirmed the district court's grant of summary judgment in favor of the defendants. While Reich may have had an interest in being paid for his services without delay, this interest was not deemed fundamental. Thus, in Reich we said that "Ii]n Mauriello v. U. of Med. & Dentistry of N.J., 781 F7.2d 46 (3d Cir.), cert. denied, 479 U.S. 818, 107 S.Ct. 80 (1986), this court acknowledged that what constitutes a property interest in the procedural due process context might not constitute one in that of substantive due process . . . . [W]hile property rights for procedural due process purposes are created by state law, substantive due process rights are created by the Constitution." Reich, 883 F.2d at 244.

We, however, did find a colorable claim of substantive due process violation in Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988), reversing the district court's grant of summary judgment in favor of the defendants. We held that "the deliberate and arbitrary abuse of government power violates an individuals right to substantive due orocess." Id. at 1129. The plaintiff, a developer who was denied a building permit, had presented sufficient evidence of a substantive due process violation actionable under section 1983 to overcome a summary judgment petition.

Though in Bello we did not discuss whether the plaintiffs possessed a property interest worthy of substantive due process protection, subsequent cases make clear that a plaintiff must have been deprived of a particular quality of property interest. In Aciernc v. Cloutier, 40 F.3d 597, 616 (3d Cir. 1994) (quoting Midnight Sessions, 945 F.2d at 679), we held that a plaintiff complaining of a violation of his substantive due process rights must prove that the governmental authority "acted to infringe [ ] a property interest encompassed by the Fourteenth Amendment." We also have stated that to prevail on a substantive due process claim, a plaintiff "must demonstrate that an arbitrary and capricious act deprived them (sic) of a protected property interest." Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1292 (3d Cir. 1993).

In DeBlasio v. Zoning Bd. of Adiustment, 53 F.3d 592 (3d Cir), cert. denied, 116 S.Ct. 352 (1995), we found that it was consistent with Bello to conclude that ownership is a property interest worthy of substantive due process protection. "Thus . . .

in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached." Id. at 601. Or, as we explained in Midnight Sessions, 945 F.2d at 683, a violation of substantive due process rights is proven if the "government's actions in a particular case were motivated by bias, bad faith or improper motive...."

Panther Hollow argues that based upon the evidence at trial, the jury reasonably concluded that the City's actions in revoking the permits were not rationally related to a legitimate government interest. It asserts that the reasons cited by the City for revocation of the permits were pretextual and not supported by the evidence. Br. at 35. Panther Hollow further argues that at the time the permits were revoked, the City was aware that each of its concerns was either non-existent, resolved, or unsupported. Therefore, Panther Hollow contends that the City's real motivation in revoking the permits was not to alleviate a health concern; but rather to appease the community residents who protested the development of the land.

The City, in contrast, argues that its actions were rationally related to a legitimate government interest, namely protection of public health and safety, as well as protection of adjoining properties and the environment. The City points to several areas in the record that demonstrate that Panther Hollow violated health and environmental regulations. Primarily, the City points out that both the County Health Department and DER independently investigated the situation, and both concluded that Panther Hollow had violated various health and environmental regulations. The City also notes that DER issued citations to Panther Hollow for environmental violations to which Panther Hollow never responded. The City further explains that it was required to follow the County's direction to take action to stop the discharge of sewage, that "[s]ewage within the confines of municipal boundaries is the responsibility of the municipality." Br. at I8 (citing app. at 2949). Moreover, the State and County violations also constituted violations of the Pittsburgh Code.

The City thus argues that it had the power to revoke the

permits, and reached the decision to do so in a reasonable and rational manner. First, the City's Land Operations Control ordinance provides:

> Whenever the work for which a permit has been issued is not being performed in conformity with the plans, specifications and descriptions filed with the application, the Chief may suspend or revoke the permit in accordance with the procedures set forth in Section 1009.13. The Chief may also suspend or revoke the permit when he finds that the continuation of the work would create a dangerous condition or a hazard to life or property.

Appellant Br. at 20-21 (citing Pittsburgh Code Title 10, Ch. 1009, Section 1009.11). The City urges that the raw sewage discharge constituted "a dangerous condition or a hazard to life or property" under the City Code. Also, the revocation decision was made at a meeting attended by several City officials familiar with the situation. At the conclusion of the meeting, a consensus was reached by the members of the meeting to revoke the permits. The City suggests that the Chief of BBI, Paul Imhoff, on whom Panther Hollow and Gross largely rely, was wrong in not revoking the permits earlier. The City argues that the decision to revoke the permits was proper and necessary to protect the health and safety of its citizens.

While we recognize that we must view the record most favorably to Panther Hollow, and we further recognize that there was widespread community ovposition to Panther Hollow's activities, the record does not support a conclusion that the City acted to appease community residents, revoking the permits in the face of knowledge that there were no real safety issues on the property. In contrast, the evidence overwhelmingly supports the City's contention that it revoked the permits to protect public safety. In these circumstances, the verdict was against the weight of the evidence, and thus we will reverse the order denying the City's motion for a new trial. Indeed, as we have pointed out, Gross's representatives knew that there were serious problems on the property. It is simply not tolerable for a land use dispute of

this kind to be packaged as a civil rights case under 42 U.S.C. S 1983.

In reaching our result, we recognize that the state court reinstated the permits. But we do not regard that action as controlling. A party does not establish that its substantive due process rights have been violated merely because a state court finds that a state actor's action in revoking a license cannot be upheld. Furthermore, Panther Hollow does not claim that the state court decision reinstating the permit was in evidence before the jury. In these circumstances, that decision cannot be used to support the verdict.

Panther Hollow further points out that the district court did rule that "the City could not argue any facts determined by [the Common Pleas Court] or necessary to [its] decision." Br. at 36. It thus appears that the decision did have some preclusive effect in the district court. Yet Panther Hollow urges that we "should give preclusive effect" to the Common Pleas decision for purposes of this appeal. Id. Of course, this argument is not germane to our review of the order denying the new trial as the Common Pleas court decision was not in evidence before the jury. If Panther Hollow thought that the Common Pleas judgment was not given adequate preclusive effect by the district court, it should have raised that issue on this appeal, but it has not done so. Its argument to us that the Common Pleas Court decision "supports the jury's verdict that the City violated [its] substantive due process rights under 42 U.S.C. S 1983," br. at 36, thus is misplaced.

Gross appeals the district court's refusal to award him damages despite the jury's verdict in his favor. As we have indicated, although the jury found that the City violated Gross's rights, it refused to award any damages. App. at 129. He contends that he was entitled to an award of at least nominal damages. On this point, we first observe that we would not remand for the entry of an award of any damages; it is possible that the jury reached a compromise verdict when it resolved the liability issue in favor of Gross, as it may at that time have intended not to award any damages following the finding on liability. Thus, the most relief Gross could obtain would be a new trial on both liability and damages. See Stanton v. Astra Pharm. Prods Inc., 718 F.2d 553, 576 (3d Cir. 1983).

In any event, the violation of Gross's rights -- the issuance of a citation which was withdrawn -- seems to us to be so inconsequential that, whatever might be true in cases involving fundamental rights, the verdict was not flawed when the jury did not award damages; it was not inconsistent for the jury to find that his rights had been violated and he suffered no damages. If Gross believed that the jury was required to award him damages as a matter of law if it found the City liable, then he should have asked the district court to charge the jury along those lines. Yet, in his brief he does not claim to have asked for that charge and we draw the inference that he did not do so because in his brief he indicates that he "preserved this issue for appeal by raising it with the trial judge after the verdict and in [his] motion to Amend Judgment or for New Trial." Br. at 3. See also br. at 31. Thus, we will affirm on Gross's crossappeal.

The effect of our decision is to reverse on the appeal to the extent that it is not moot, and to affirm on the crossappeal to the extent that it is not moot. Thus, we will remand the case for a new trial, but only as to Panther Hollow's claim against the City. As we have pointed out, however, we are not precluding the City from moving for summary judgment.
Furthermore, on the remand the City is free to raise Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), and Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986), cases we brought to the attention of the parties prior to oral argument on this appeal.

In this regard, we point out, even though our result is not dependent on the observation, that the state proceedings should make Panther Hollow substantially whole for the actual interference with the use of its property, for the City takes the "position that since the City acquired the property as of December 1, 1989, whatever civil rights claims Panther Hollow has and damages which follow would be only for a period of twenty-one days." Br. at 9. Of course, the 21-day period would start when the City revoked the permits. Thus, in the state proceeding the City concedes that "Panther Hollow will receive the fair market value of the property . . . as of December 1, 1989." Br. at 13.

Panther Hollow and Gross have filed a motion to dismiss the appeal and for sanctions. After a careful review of this matter, we

have concluded that while the appeal has not been well presented, we nevertheless should deny these motions.

III. CONCLUSION

For the foregoing reasons, we will reverse the order denying the City a new trial and will affirm the order denying Gross's motion to amend the judgment. We will deny the motion to dismiss the appeal and deny the motion for sanctions. We will remand the matter for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

DATED: March 14, 1997

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SOL GROSS, an individual, PANTHER HOLLOW CORPORATION, Plaintiff,	)	
vs.	)	Civil Action No. 91-1895
CITY OF PITTSBURGH, Defendant.	)	

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED as follows:

1. Judgment be, and hereby is, entered in favor of defendant, City of Pittsburgh, and against plaintiff Sol Gross as to the claim asserted by plaintiff Sol Gross in Count One of the complaint.
2. Judgment be, and hereby is, entered in favor of plaintiff Panther Hollow Corporation and against defendant, City of Pittsburgh, in the amount of $565,824.00 as to the claim asserted by plaintiff Panther Hollow Corporation in Count Two of the complaint.

13 March 1996
Date

Clerk

/S/William L. Standish
WILLIAM L. STANDISH
UNITED STATES DISTRICT JUDGE

(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SOL GROSS, an individual, and PANTHER HOLLOW CORPORATION	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 91-1895
CITY OF PITTSBURGH,	)	
Defendant.	)	

SPECIAL VERDICTS

AND NOW, this 12 day of March, 1996, we, the jurors empaneled in the above-entitled case, return the following special verdicts, pursuant to Fed.R.Civ.P. 49(a):

1. State the amount of damages you find that plaintiff Sol Gross is entitled to recover from defendant, City of Pittsburgh, for the violation of his civil rights under Section 1983.

   $ 0

2. What was the fair market value of the property of plaintiff Panther Hollow Corporation before the revocation of its permits on November 9, 1989?

   $ 2,500,000

3. What was the fair market value of the property of plaintiff Panther Hollow Corporation after the revocation of its permits on November 9, 1989?

$ 2,000,000

(Exhibit B)

4. State the amount of damages you find that plaintiff Panther Hollow Corporation is entitled to recover from defendant, City of Pittsburgh, for the 64-month period between the date of the revocation of its permits in November, 1989 and the date of your verdict on liability in February, 1996.

$ 565,824

(After you have answered Special Verdict No. 4, please inform the Deputy Clerk so that you may return to the courtroom to deliver your verdicts.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SOL GROSS, an individual, and PANTHER HOLLOW CORPORATION,	)	
Plaintiffs,	)	
VS.	)	Civil Action No. 91-1895
CITY OF PITTSBURGH,	)	
Defendant.	)	

SPECIAL VERDICTS

AND NOW, this 26 day of February, 1996, we, the jurors empaneled in the above-entitled case, return the following special verdicts, pursuant to Fed.R.Civ.P. 49(a):

1. Do you find by a preponderance of the evidence that the conduct of defendant, City of Pittsburgh, on September 18, 1989, violated the rights of plaintiff Sol Gross under Section 1983 of the federal Civil Rights Act?

Yes X No ___

(Regardless of your answer to Special Verdict No. 1, please answer Special verdict No. 2.)

2. Do you find by a preponderance of the evidence that the conduct of defendant, City of Pittsburgh, on November 9, 1989, violated the rights of plaintiff Panther Hollow Corporation under Section 1983 of the federal Civil Rights Act?

Yes X No ___

(Exhibit C)

(After you have answered Special Verdict No. 2, please inform the Deputy Clerk so that you may return to the courtroom to deliver your verdicts.)

_____	_____
_____	_____
_____	_____
_____	_____

APPENDIX D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PANTHER HOLLOW CORPORATION	:	
v.	:	
CITY OF PITTSBURGH BOARD OF STANDARDS AND APPEALS, Appellant	:	No. 1743 C.D. 1995

ORDER

NOW, this 18th day of March, 1996, upon consideration of appellee's emergency motion re: prior petition to dismiss for mootness, and in reliance upon the representation of George R. Specter, Esquire, attorney for appellant, that the property interest in the case has been affected by the appellant, because the appellant has withdrawn preliminary objections in opposition to appellee's petition for appointment of viewers to assert a de facto condemnation, appellee's petition to dismiss for mootness is granted and this appeal is dismissed as moot.

/S/James R. Kelley
JAMES R. KELLEY, Judge

CERTIFIED FROM THE
RECORD AND ORDER
EXIT

MARCH 18, 1996
/s/ C.R. Hostutler
Deputy Prothonotary -
Chief Clerk

APPENDIX E

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYVANIA CIVIL DIVISION

PANTHER HOLLOW CORPORATION,	)	
Appellant,	)	No. SA 3428-90
v.	)	
CITY OF PITTSBURGH BOARD OF STANDARDS AND APPEALS,	)	
Appellee	)	

OPINION AND ORDER SUSTAINING APPEAL

Filed by:

Robert C. Gallo, J.

Criminal Court Judge
Common Pleas Court
513 Courthouse
Pittsburgh, PA 15219

(412) 355-3831

Copies sent to:

James R. Cooney
Counsel for Appellant

Howard J. Schulberg
Assistant City Solicitor
Counsel for Appellee

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

PANTHER HOLLOW CORPORATION,	)	
Appellant,	)	No. SA 3428-90
v.	)	
CITY OF PITTSBURGH BOARD OF STANDARDS AND APPEALS,	)	
Appellee	)	

GALLO, J

OPINION

I. PROCEDURAL HISTORY

This case comes before this Court by way of a statutory appeal filed by Appellant, Panther Hollow Corporation (PHC) requesting a de novo hearing. The subject of this appeal involves a tract of land located in the fourth and fourteenth wards of the City of Pittsburgh. The source of Appellant's discontent arose from the revocation of three of its permits relating to the developing of a parking lot on 42.7 acres of the property. The Bureau of Building Inspection of the City of Pittsburgh revoked the permits on November 9, 1989. PHC appealed that decision to the Appellee, City of Pittsburgh Board of Standards (the Board) and after a hearing, it was affirmed by the Board on January 16, 1990. Since the record of the proceeding before the Board was not complete, the status of the matter made a remand impractical.

Before commencement of a de novo hearing, this Court denied

Appellant's request to stay the adjudication of the Board. In addition, a motion for reinstatement of the permit was also denied. The City also argued that PHC's appeal from the Board's decision was untimely filed, but this Court denied that motion. Appellant generally argues that revocation of its permits was accomplished in an arbitrary and capricious manner. Appellee counters that the revocation resulted from violations of various City ordinances pertaining to the tract.

II. FACTS

In early 1989, Appellant, Panther Hollow Corporation (PHC) together with three individuals entered into an agreement to buy a tract of land consisting of twenty-six (26) acres from the CSX Railroad located in both the fourth and fourteenth wards in the City of Pittsburgh. PHC's intention was to develop a parking lot for approximately five hundred sixty-five (565) cars on said tract of land. The parking lot was to be situated on a large portion of the land which is located on Boundary Street.

The land had been the source of illegal dumping of garbage and junk for a number of years and had been cited by the City for clean up purposes. It was also landslide prone due to the dumping of materials on the hillside necessitating the closing of Boundary Street. Prior to the purchase of the property, PHC was hired by the former owners to remove the objectionable materials from the property which it accomplished with the City's Bureau of Building Inspection approval.

Subsequently, PHC requested and received permission from the City to re-grade the Boundary Street area and to construct an asphalt drive. As a result, a land operations permit was issued on July 27, 1989. On October 19, 1989, a temporary certificate of occupancy was also issued to PHC, and then on October 20, 1989, an application for a parking lot permit was issued.

After work had been commenced on the property, a slide developed which emanated from the prior years of dumping. As a result, PHC retained the services of a duly qualified soils engineering firm, Geo Mechanics Inc., to determine the stability of the hill. Both PHC and the City agreed that Geo Mechanics was duly qualified to make that determination.

Both the Engineering firm and the City concluded that the cause of the slide was the result of the prior dumping which had occurred before PHC had purchased the property. The firm further concluded that the hill posed no imminent danger, that the site was safe for its proposed use as a parking lot, and that grading improved the stability of the hill.

In spite of this determination, concerns regarding City water lines that ran through the property were subsequently raised. During this period of time, a citizens group known as Oakland Directions Inc., (ODI), had complained to the City regarding generally the development of the site, and more particularly the instability of the hillside and its excessive drainage. Because of their concerns, the City's director of planning met with ODI on at least three occasions during the latter part of the year. The last occasion for a meeting of City officials with ODI occurred on November 7, 1989.

On September 27, 1989, in response to the concerns of the City, PHC had agreed to install a new 16-inch water line according to City specifications, and made arrangements for a drainage plan. This entailed a proposed installation at PHC's own expense with the plans to have been submitted by March 1, 1990.

By letter of Novemmer 1, 1989, to Sol Gross, Alex G. Scuilli, Director of the Department of Engineering and Construction confirmed the agreement and requested that PHC submit its engineering plans and specifications for a 16-inch water line to be installed at its own expense with anticipated completion of the project to occur by June 1, 1990.

In accordance with the directives of the Bureau of Building Inspection, PHC installed a chain link fence around the fire hydrant excavation. PHC incurred considerable expenses attempting to build the parking lot and PHC had been extremely cooperative with the Bureau of Building Inspection during the clean up and improved the site.

on November 9, 1989, the three permits of PHC were revoked. The City, through Dominic Cimino, the Assistant Superintendent of Building Inspection, concluded that PHC was in excess of 16,000 cubic yards of fill that was to be moved and that the fill it placed had depth in excess of twenty feet. The City further concluded that dangerous conditions resulted including but

not limited to placing an excessive overburden on two City sewers and a water line, making useless City fire hydrants in the area, placing an excessive overburden on a Duquesne Light transmission, interfering with sewer systems of adjoining property owners, causing landslides in the Panther Hollow area, and placing the fill in a manner that would cause excessive drainage in the Panther Hollow-Boundary Street area.

In addition, PHC was directed to cease all operations. At the time of this revocation, Paul Imhoff, the Chief of the Bureau of Building Inspection, was out of town at a meeting. He had approved and signed the temporary permits issued to PHC. However, the letter of revocation was signed by Dominic Cimino, the Assistant Superintendent of the Bureau of Building Inspection. On November 22, 1989, Geo Mechanics Inc., on behalf of PHC responded by letter to the Bureau of Building Inspection's decision that alleged dangerous and hazardous conditions had not been created to the degree indicated by the City of Pittsburgh. Notwithstanding, the City declined to reinstate the permits.

III. CONCLUSION

Because a record of the proceedings before the Board of Standards and Appeal is incomplete, a de novo hearing was held before this Court to determine whether the revocation of Appellant's permits by Appellee was proper. Therefore, the burden on proof was upon Appellee to demonstrate that the revocation of Appellant's permit was appropriate under existing law. Appeal of Lawrence T.P. Bd. of Sup'rs, 544 A.2d 1070, 1074 (Pa. CMNWLTH 1988).

Testimony presented by the City did not confirm the severity of the alleged problems. It is undisputed that revocation of the permits occurred before the due date of PHC's plan submissions. Paul Imhoff, Chief of the Bureau of Building Inspection, who was personally familiar with the site and Appellant's work, testified that there were no problems with Appellant's work. In addition, he further testified that the revocation of the permits was unjustified in light of Appellant's cooperation. Sol Gross, the President of PHC testified that he had incurred costs of approximately $142,737 in building the parking

lot.

The City revoked the land operations permit because PHC was allegedly in excess of 16,000 cubic yards of fill. James R. Deglau, the sole principal of Deglau Engineering, had been hired by PHC to prepare a boundary survey and a plot plan which he submitted to Sol Gross on November 8, 1989. He testified that he prepared an analysis of the amount of earth that PHC moved on the site, concluding that only 14,511 cubic yards of earth had been moved. Furthermore, the Assistant Superintendent's testimony indicated that he accepted the numbers submitted in a report by Thomas F. Easton showing cuts totaling 14,447 cubic yards and fills amounting to 15,780 cubic yards. It is undisputed that Easton had been retained by the City's Department of Engineering.

Although the City had hired Easton to ascertain the amount of dirt that had been moved, the Assistant Superintendent testified that he was not aware of the report. Finally, he testified that'he was not sure from whom he had actually obtained information that PHC had moved in excess of 16,000 cubic yards of fill.

The City had also concluded that PHC had placed a fill in excess of twenty feet. However, Deglau testified that the highest level of fill on the Panther Hollow property was ten feet three inches.

The Assistant Superintendent testified that he had never visited the site before he revoked the permits. One of the reasons he gave for revoking the permits was PHC's placing an excessive overburden on a Duquesne Light transmission. Yet he testified that Duquesne Light informed him that they really weren't concerned with an excessive overburden.

When questioned about the alleged excessive overburden on two City sewers and water lines, the Assistant Superintendent acknowledged that he was aware that PHC had an agreement with the Water Department to install new water lines but was generally evasive when responding to questions how it would have been a concern to the City since PHC agreed to install new water lines. He further testified that he was unsure whether City inspectors or complaints from adjoining property owners brought to his attention that the sewer systems of the owners was being interfered with.

Although one of the reasons he gave for revoking the permits was the landslides caused by PHC in the area, he testified

that he was unaware that the area was landslide prone, and did not deny that PHC might not have caused the landslides. He admitted there was no verification in his files that PHC placed the hill in a manner that would cause excessive drainage. Furthermore, he acknowledged that before he revoked the permits, his project chief was Satisfied that only a few minor conditions needed to be satisfied on the parking lot.

Finally, the Assistant Superintendent agreed that he had no written reports in his file from any Bureau of Building Inspection employee regarding their personal observations of the conditions on the site prior to his revocation letter of November 9, 1989. Althouch he had previously testified that he had no recollection of a study made by Three Rivers Diving, a private contractor for the City, after examining his file he acknowledged that there was no problem with the sewers. Daniel Feeney, a Senior Building Inspector employed by the Bureau of Building Inspections, testified that he visited the site many times, yet never recommended revocation of the permits. Although the City asserted in the revocation letter that a large portion of the parking space was located on Boundary Street, PHC's plot plan for the proposed parking lot indicates that none of the area was on Boundary Street.

Based on all of the testimony, the Board has not met its burden on this point and PHC has presented competent credible evidence to prove all of the elements, both procedural and substantive necessary to support its adjudication, Lawrence, Supra. Furthermore, this Court has had the benefit of viewing the property and observing Appellee's witnesses who testified in a very credible manner. Finally, PHC incurred considerable, expenses in its attempt to satisfy the City.

Under Title 10, Section 1009.11 of the Pittsburgh Building Code, the Chief of the Bureau of Building Inspection has the authority to revoke a permit when he finds that the continuation of work would create a dangerous condition or hazard to life or property as follows:

> "Whenever the work for which a permit has been issued is not being performed in conformity with the plans, specifications and descriptions filed with the application, the Chief may suspend or revoke the permit in accordance

with the procedures set forth in Section 1009.13. The Chief may also suspend or revoke the permit when he finds that the continuation of the work would create a dangerous condition or hazard to life or property."

Although concerns existed regarding the sewers and water lines, it is apparent that dangerous and hazardous conditions were not created to the degree indicated by the City. See Thomas v. Zonina Rearing Board, Pa. CMNWLTH, 349 A.2d 518 (1975).

Therefore, it is the opinion of this Court that the City's reliance upon Section 1009.11, to revoke the permits was unjustified since the continuation of PHC to develop the parking lot will not create a hazard to life or property. In short, the evidence established that the revocation of the permits under Section 1009.11 was unjustified.

For the above stated reasons, PHC's statutory appeal is granted. An appropriate order accompanies this Opinion.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

PANTHER HOLLOW CORPORATION,

Appellant,

V.

CITY OF PITTSBURGH BOARD OF STANDARDS AND APPEALS,

Appellee.

No. SA 3428-90

ORDER OF COURT

AND NOW, to-wit, this 7 day of July, 1992, it is hereby ORDERED, ADJUDGED and DECREED that the Appellant's land operations permit, temporary certificate of occupancy and application for a parking lot permit be reinstated.

By the Court

/S/Robert C. Gallo, J.
Robert C. Gallo, J.

APPENDIX F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PANTHER HOLLOW CORPORATION

V.

CITY OF PITTSBURGH, BOARD OF
STANDARDS AND APPEALS,
Appellant

No. 1550 C.D. 1992
ARGUED: December 14, 1992

BEFORE: HONORABLE MADALINE PALLADINO, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE NARICK

FILED: February 22, 1993

The City of Pittsburgh (City) appeals from an order of the Court of Common Pleas of Allegheny that reversed the decision of the City's Board of Standards of the City's Board of Standards and Appeals (Board). The Board's order upheld the revocation of permits previously granted to Panther Hollow Corporation (PHC) to build and operate a parking lot. We vacate and remand.

The City, through its various departments and bureaus granted permits and certificates to PHC, including land operations permit, a certificate of temporary occupancy and a parking lot permit. A citizens group, Oakland Directions, Inc. (ODI), complained to the City, attempting to stop PHC's land operations. Shortly thereafter, on November 9, 1989, Dominic Cimino, the Assistant Chief of the Bureau of Building Inspection, to build and revoked all of PHC's permits, listing nine reasons for the revocation.

PHC appealed the revocations to the Board. After hearing, the Board affirmed the revocations in a written decision, dated January 31, 1990. The Board's order evidences a mailing date of February 13, 1990. PHC, however, alleges that it never received notice of the decision until November 9, 1990, when a hand-delivered copy was presented to PHC's counsel at a meeting with various City officials. On November 27, 1990, PHC filed an appeal to the trial court, requesting a trial de novo.

PHC, in a Motion for Allowance of Discovery, alleged that the City had commingled prosecutorial and adjudicatory functions, and had improperly placed the burden of proof on PHC to show why the permits should not have been revoked. The City moved for dismissal on grounds that PHC's appeal was untimely in that the appealls filing date exceeded the permissible appeal period by more than eight months.

The Honorable Paul Zavarella heard oral argument on both motions and, after reviewing the.record b efore the Board, found the Board's record to be incomplete. Judge Zavarella ordered PHC's appeal to be heard de novo before the Honorable Robert Gallo, and further held that initially the City had the burden of proof to show that the permits were revoked for cause. Judge Zavaralla did not address the timeliness issue in his order nor is a transcript of any proceedings, concerning these motions, in the record.

At the start of the trial presided over by Judge Gallo, the city again raised the timeliness issue. PHC's counsel argued that Judge Zavarella had dispensed with this issue in chambers and that by implication his order, providing for the de novo hearing, subsumes the dismissal of the City's objection on timeliness grounds. Judge Gallo accepted this argument and denied the City's motion to dismiss. After the trial, which included a view of the site, Judge Gallo ordered that PHC's permits be reinstated because the revocation was unjustified.

On appeal[1], the City raised the following issues for our review: (1) whether the trial court erred in failing to grant the City's Motion to Dismiss because PHC filed an untimely appeal; (2) whether the trial court erred in holding that the City had no justification to revoke PHC's permits; (3) whether substantial evidence supported the trial court's finding of unjustified revocation; and (4) whether the trial court erred in placing the burden on the City to prove that it had just cause for revoking PHC's permits.

The City first argues that th e trial court did not have jurisdiction to hear PHC's appeal from the Board's order because PHC filed its appeal more than nine months after the Board allegedly mailed the notice of its decision. The City maintains that the Board's written decision, dated January 31, 1990, was mailed to PHC on February 13, 1990 and, therefore, PHC's appeal had to be filed within thirty days of the mailing date.

Sections 5571(b) and 5572 of the Judicial Code, 42 Pa. C.S. §§5571(b) and 5572 provide that appeals from a government unit to a court must be commenced within thirty days after entry of the order and that the date of mailing shall be deemed to be the date of entry. Moreover, the burden is on the governmental unit to show when its decision was mailed. Hanna v. Zoning Boardof Adjustment, 62 Pa. Commonwealth Ct. 620, 437 A.2d 115 (1981). Additionally, the notice, to constitute competent evidence, must be attested by the proper official. Groff v. Department of Transportation, Bureau of Traffic Safety, 78 Pa. Commonwealth.Ct. 580, 467 A. 2d 1224 (1983). Also see

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1 In a case where the trial court takes additional evidence and decides the case de novo, our scope of review is limited to a determination of whether the trial court abused its discretion or committed an error of law. Caporali v. Ward, 89 Pa.Commonweatlh Ct. 621, 493 A.2d 791 1985).

Sections 6103,[2] 6104(a)[3] and 6104(b)[4] of the Judicial Code, 42. Pa. C.S. §§6103, 6104(a) and 6104(b).

The record certified to this Court does not contain the transcript of the proceedings before Judge Zavarella. Thus, we do not know whether the City had the opportunity to give evidence, concerning the mailing date or, in fact, failed to prove that it

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Section 6103 states in perinent part that:

(a) General rule.--An official record kept within this Commonwealth by any... goverment unit, or entry therein, when admissible for any purpose, amy be evidenced...by a copy attested by and accompanied by a certificate that the officer has the custody. The certificate may be made by any public officer having a seal of office and having official duties with respect to the government unit in which the record is kept, authenticated by the seal of his office,...

Section 6104(a) General rule.--A copy of a record of government action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissable as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.

Section 6104(b) states:

(b) Existence of facts.--A copy of a record wuthenticated as provided in section 6103 disclsoing the existence or nonexistence of facts which have been recorded pursuant to an official duty or would have been so recorded had the facts existed shall be admissable as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

mailed the notice.[5] We also do not know what evidence PHC presented, if any, to rebut the presumption of the regularity of administrative acts of public officials. See Mihordin v. Unemployment Compensation Board of Review, 80 Pa. Commonwealth Ct. 569, 471 A.2d 1334 (1984); and Groff. Furthermore, because the City has the burden to prove that it mailed the notice of its decision to PH C, we cannot simply assume notice was mailed, nor can we assume that the copy of the notice in the record is competent evidence, without the officer having custody of the original notice, attesting t'o the copy's authenticity.

Without a specific finding setting forth a determination that the City either mailed the notice of the Board's decision on February 13, 1990, or hand-delivered it on November 9, 1990, we cannot conclude whether PHC filed an untimely appeal. Because a decision on this issue concerns whether the trial court had jurisdiction to hear the case on the merits and in turn whether this Court has jurisdiction, we will not consider the other issues presented.

Accordingly, we vacate and remand to the trial court for specific findings relating to the timeliness of PHC's appeal.

/s/ Emil E. Narick
Emil E. Narick, Senior Judge

Judge Pellegrini did not participate
in the decision in this case.

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The deposting of a properly addressed prepaid letter into the mails raises the presumption that it reaches its destination. The mailing is prima facie evidence of receipt, and mere denial of receipt is insufficient to rebut the presumption. Moore v. Department of Public Welfare, 129 Pa. Commonwealth Ct. 19, 564 A.2d 555 (1989).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PANTHER HOLLOW CORPORATION

V.

CITY OF PITTSBURGH, BOARD OF
STANDARDS AND APPEALS,
Appellant

No. 1550 C.D. 1992

ORDER

AND NOW, this 22nd day of February, 1993, the order of the Court of Common Pleas of Allegheny County, dated July 7, 1992, is vacated and the record is remanded for further proceedings not inconsistent with the foregoing opinion.

Jurisdiction relinquished.

/s/ Emil E. Narick
Emil E. Narick, Senior Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
Feb 22 1993

/s/ C.R. Hostutler
Deputy Prothonotary - Chief Clerk

APPENDIX G

CITY OF PITTSBURGH
PENNSYLVANIA

BOARD OF STANDARDS AND APPEALS

This Order of the Board was mailed to:

Panther Hollow Corporation
on February 13, 1990

Case #3 - 1990

January 31, 1990

BOARD MEMBERS
Bernard Liff, FAIA
Eugene V. Dotter, P.E.
Paul J. Imhoff, Chief, B.B.I.
Ann Maria Guzman, R.A.
Arthur C. Schock, P.E.

LOCATION: Boundry Street Ward 4

APPELLANT: Panther Hollow Corporation
3810 Crooked Run Road
N. Versailles, PA 15137

DATE OF HEARING: January 16, 1990

PRESENT AT HEARING: Messrs. Liff, Dotter, Schock, Cizino and Mrs. Guzman. Board Members: Ronald Graziano and Robert Friel, Advisors.

IN OPPOSITION: Oakland Directions,Inc. (Community Group)

SUBJECT: Requested reinstatement of the Land Operations Permit and the Temporary Certificate of Occupancy which were

revoked by the Bureau of Building Inspection on November 9, 1989.

DECISION: The request for reinstatement of the Land Operations Permit and the Temporary Certificate of Occupancy is denied.

FOR THE BOARD OF STANDARDS AND APPEALS

/s/ Dominick J. Cimino
Dominick J. Cimino

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-3242
No. 96-3267

SOL GROSS, an individual and
PANTHER HOLLOW CORPORATION,

Appellees,

Vs.

THE CITY OF PITTSBURGH,
Appellant.

(W.D. Pa. C.A. 91-1895)

PETITION FOR REHEARING

Appeal from judgment of the United States District Court for the Western District of Pennsylvania in favor of Panther Hollow Corporation dated March 25, 1996

Maurice A. Nernberg
Pa. I.D. No. 00127

MAURICE A. NERNBERG & ASSOCIATES
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334

Firm No. 331
Counsel for Appellees

PETITION FOR REHEARING

Petitioner, Panther Hollow Corporation (PHC) and Sol Gross (Gross) request consideration of this Petition by the Panel and the Court in banc.

I. THE PANEL SHOULD NOT HAVE GRANTED A NEW TRIAL BASED ON THE LACK OF SUFFICIENCY OF THE EVIDENCE.

By a decision filed on March 14, 1997, a three member panel of this Court granted the City of Pittsburgh a new trial despite the City's failure to move for a new trial or judgment n.o.v. following the presentation of all evidence. The Panel's decision is inconsistent with the decisions of this Court. A copy of the Panel's Opinion is attached hereto as Exhibit

A. PHC and Gross raised the issue of the requirement of a motion following the presentation of all evidence as it applied to the City's request for a judgment as a matter of law. [Consol. Cross Appeal and Reply Br. at 33.] As the Panel correctly stated, PHC and Gross cited Pulla v. Amoco Oil Co., 72 F.3d 648 (8th Cir. 1995) for the standard of review. However, they did not cite, Yohannon v. Keene Corp., 924 F.2d 1244 (3d Cir. 1991) -- a contrary case holding that a court may not consider a motion for a new trial if no such request was made after the presentation of all evidence.

The Panel, without citing any authority, held that the failure to reference the Yohannon limitation, waived the objection. That is in error. In Yohannon, the Yohannons did not object on the basis of the need for a motion for new trial after the close of all the evidence, only arguing, as we did, that the lack of such a motion prevented entry of judgment n.o.v:

> The Yohannons contend in their brief, *see* Brief for Appellees at 26, that Raymark waived the right to judgment n.o.v. when it failed to renew its motion for a directed verdict at the close of all the evidence. In its reply brief, the Company [Raymark] limited the relief

> requested to a new trial and disclaimed any hope for a judgment n.o.v.
>
> ...
>
> The full nature of this procedural problem, however, still escapes Raymark. The Yohannons, although they argue waiver, also fail to see the precise nature of this problem as it relates to sufficiency of the evidence (citations omitted).
>
> ...
>
> On sufficiency, the failure to move for a directed verdict at the close of all evidence does more than limit an aggrieved party's remedy to a new trial. In this Circuit, it wholly waives the right to mount any post-trial attack on the sufficiency of the evidence (citations omitted).

Id. at 1261-62. The Yohannon court cited Gebhardt v. Wilson Freight Forwarding Company, 348 F.2d 129 (3rd Cir. 1965) for the proposition that failure to move for a directed verdict at the close of all evidence "totally forecloses any consideration of sufficiency questions in the absence of a proper motion for a directed verdict" Id. at 1262. "Gebhardt remains the law of this circuit unless overruled in banc (footnote and citations omitted)" Id. at 1263. In O'Hommel Co. v. Ferro Corp., 659 F.2d 340 (3rd Cir. 1981), the Court held that a panel cannot overrule a prior panel precedent -- which is what the Panel is doing here, under the guise of the need for an objection.

In a case involving a motion for judgment n.o.v., Beebe v. Highland Tank and Manufacturing Company, 373 F.2d 886 (3d Cir. 1967), this Court explained that the rule is a limitation on the power of the court:

> And judicial power exists under rule 50(b) to grant judgment notwithstanding the verdict only when a motion for a directed verdict has been made at the conclusion of all evidence, and, in legal contemplation, the questions thus raised have been reserved for subsequent determination. We have repeatedly held, very recently, in Gebhardt v. Wilson Freight Forwarding Co., Supra, 'that

> the introduction of evidence after the denial of a motion for a directed verdict constitutes a waiver of the error, if any, in the denial unless the motion is renewed at the close of all of the evidence.' We adhere to that ruling.

While it is not our choice whether to adhere to the ruling, it is clear in Yohannon, that the Appellee did not raise the waiver issue, the court did. Moreover, the Beebe and Yohannon cases, along with Gebhardt, make clear that the rule requiring a motion at the close of the evidence involves the power of the court. The parties cannot confer jurisdiction to the court. Beach v. KDI Corp., 490 F.2d 1312 (3d Cir. 1974)(parties can not create pendent jurisdiction by agreement); Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973)(parties can not create subject jurisdiction by agreement.) The limitation on the court's powers is not waived by failure to bring it to the attention of the court.

In Lowenstein v. Pepsi-Cola bottling Co. of Pennsylvania, 536 F.2d 9 (3d Cir. 1976), the court discussed the rationale of the rule, citing 5A Moore's Federal Practice, §50.08, to the effect that to ask the court to reexamine the general jury verdict when there has been no motion for a directed verdict, would be violative of the 7th Amendment. See, Consol. Cross Appeal and Reply Br. at 4, 33 (7th Amend. cited). Having put in evidence after its motion for judgment was denied, the City waived any prior error, Lowenstein, at 11.

II. THE PANEL WAS IN ERROR IN NOT AWARDING SOL GROSS NOMINAL DAMAGES AS A RESULT OF THE CITY'S VIOLATION OF HIS CIVIL RIGHTS.

In this trial, with bifurcated damage and liability verdicts, the jury found that the City violated Gross' civil rights. However, it awarded him no damages. Immediately following the verdict on damages, before the jury was excused, Gross asked for the issue of nominal damages to be considered. [Consol. Cross Appeal and Reply Br. at 3.]

The Panel held that the violation of Gross' rights was inconsequential and therefore, the verdict was not flawed for not awarding damages. It suggested that Gross should have asked for binding instructions if he

believed that he was entitled to damages. While we disagree with the characterization of this Panel's term "inconsequential" in light of the other indignities suffered by Gross (such as having had to pay a mortgage at $10,000 monthly from 1989 through 1997, despite the City "taking" the property "as of" December 1, 1989 in March of 1996), that is not relevant. In Carey v. Piphus, 435 U.S. 247 (1978) the Supreme Court held that:

> Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed... (citations omitted) we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. (footnote omitted).

The Panel supported its conclusion by stating that:

> We would not remand for the entry of an award of any damages; it is possible that the jury reached a compromise verdict when it resolved the liability issue in favor of Gross, as it may at that time have intended not to award any damages following the finding on liability. Thus, the most relief Gross could obtain would be a new trial on both liability and damages.

The Panel's analysis is flawed.

The Panel compared the situation here with that in Stanton v. Astra Pharm. Prods., Inc., 718 F.2d 553 (3d Cir. 1983). Stanton was not a bifurcated verdict. After a trial, the law changed as to damages, and the district court ordered a retrial for damages. On appeal, this Court held that the original award may have been a compromise and therefore, the defendant was entitled to a whole new trial. Gross' situation is not analogous.

The Panel determined that the failure to request a binding instruction on this issue was fatal, but cites no authority therefore. That is because there is no such authority. The verdict was inconsistent with the liability finding and should have been ameliorated.

III. THE PANEL ERRONEOUSLY CONCLUDED THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

Despite giving lip service to having considered the record in a light most favorable to PHC and Gross, the Panel erroneously concluded numerous matters favorably to the City, even though there was significant contrary evidence.

The Panel states: "Ace completed the work on June 15, 1989, and at that time ... commenced substantial land operations on the property without applying for a required permit." [Op. at 3.]

Anthony G. Berardi, the heavy equipment operator for PHC, testified that until being stopped by the police in July, he graded the debris that had been dumped on the site over the years but did not do any excavation. His work was under the direction of the BBI inspector. [App. 1306-8.] Gross testified that his work, until July, consisted of clean up work and not land operations. [App. 1297.]

The Panel states that: "In its application, Panther Hollow misrepresented that the property was not in a landslide prone area." [Op. at 3.] However, the application was filled in by representatives of the City Planning Department (Mr. Brown). PHC's Mr. Gross did not even have access to the zoning map, Mr. Brown did. [App. 1459.] This testimony was not contradicted.

The Panel states that: "On or about July 20, 1989 ... the City learned that Panther Hollow was causing hauling of fill onto the property without a permit." [Op. at 4.] In fact, PHC had a permit to haul fill onto the site. It was the hauler who did not have a permit. And, although the City authorized PHC to install fill on its site, it would not authorize the hauler to bring it in.

The Panel states that in its permit application, PHC represented that a special inspector would be employed to report to the City. "However, the special inspector made no inspections and filed no reports

...." [Op. at 4.] This conclusion is unwarranted. Imhoff (the BBI Superintendent at the time), who had authority to waive the requirement of a special inspector, testified that it was not necessary to have a special inspector on such a simple project. [App. 2871, 2932.]

The Panel states that: "Panther Hollow refused to clean up the discharge", referencing the discharge from sewage systems from adjoining landowners that the Panel describes as "damaged". [Op. at 4.] In fact, the system was not "damaged" and PHC had nothing to do with it. [App. 1219, 1310-11, 1435, 1490.] It was simply not functioning and had never functioned. [App. 3146, 2962, 3176, 3198, 406-409, 554-557, 2949, 769-770.] PHC had no responsibility to remediate the neighbor's discharge. Apparently, the sewage had leaked for years. It just was not noticeable until PHC cleaned up the area. It is in issues such as this that the jury could well have found the City's actions pretextual, given that despite overwhelming evidence that PHC was not responsible for the discharge, the City misrepresented the issue. It is only surprising that the Panel took up the City position. It could not have reviewed all of the testimony and concluded as it did.

The Panel states that: "The County inspection further determined that Panther Hollow was creating an excessive overburden on the property and was otherwise in violation of County and state statutes and regulations." [Op. at 5.] First, the overburden was not caused by PHC bringing in fill. Rather, it resulted from the cleanup operations, which were directed by the City (total fill brought to the site was about 70-75 yards, which equates to about 1/2" of overburden over the 28 acre site). [App. 1310.] Second, the overburden was not a problem, just a pretext. It was not nearly as deep as misrepresented by the City (11' versus 20' and caused no damage). [App. 3137, 3176, 3193.] Lastly, PHC did comply with the state laws. It installed haybales to prevent runoff. And, as Imhoff said, if there was a County violation, it would not be the basis for the City's revocation. How could PHC dispute a revocation by the City for a County violation? City could not adjudicate a County citation. Does the Panel seriously suggest that the City has the authority to revoke a validly issued permit on the basis of the laws of another jurisdiction?

The Panel stated that, "the Director of the City Water Department was concerned that Panther Hollow had buried a City water line under an excessive amount of fill" and, though it agreed to relocate the line, it

"took no actions to effectuate the relocation." [Op. at 6.] Here, the Panel disregards the uncontroverted evidence that PHC and the City agreed that the water line would not be relocated until the spring of 1990. [App. 3154.] The permit was revoked on November 9, 1989. In fact, PHC was required, at its own expense, to put in a larger line than had been on site. [App. at 981.] PHC had authorization from Public Works to install the fill over the water line, Public Works not being aware of the existence of the line. The line apparently not being registered with Pennsylvania One Call, in violation of the law. [App. 954, 1417, 1440.] The manholes would rise with the water line.

In fact, the latter item is evidence of the pretextual nature of the City's complaints. If the overburden was so important and access to the water line was critical, (1) why did the City revoke the permits before PHC could replace the water line and, (2) why did the City install Jersey barriers to prevent access to the site by emergency vehicles?

Astoundingly, the Panel then states that: "Although a meeting was held on September 21, 1989, in an attempt to resolve the dispute between Panther Hollow and the City, the parties did not reach a resolution." [Op. at 6-7.] No one disputed that a resolution had been reached. [App. 789, 1455.] The City called other attendees of the meeting as witnesses, but they were not asked about the meeting. The proof of the foregoing is that following the meeting, PHC completed the parking lot without interference by the City. The permits were revoked after the parking lot and land operations work were completed. The real issue is that the occupancy permit for a parking lot was revoked, preventing its use after completion.

This Panel then states that the temporary occupancy permit issued to PHC on October 20, 1989 carried the signature of the chief of BBI, although it should have had the signature of the senior inspector. [Op. at 7.] Although the significance of that is lost on the writer, any concern should have been alleviated when the senior inspector wrote to PHC and set out two minor conditions to opening the parking lot. [App. 3153.]

This Panel states that on October 23, 1994, a representative of City Planning inspected the property and identified violations of state and County health regulations -- and also found that PHC had moved more than 16,000 c.y. of material requiring a conditional use application. [Op. at 7.]

This is the most nefarious of all of the City's pretextual arguments for revoking the permits. In fact, it was this claim, often repeated and constantly disproved, that the City used as a pretext to move PHC's permitting into the political arena. This issue was at the heart of PHC's claim that the City's sole purpose in making this blatantly false argument, was to satisfy the residents that no parking lot would be constructed.[1] Only if 16,000 c.y of earth were moved, would the issuance of a permit become discretionary. Berardi, who performed the work and maintained a logbook, calculated only 8380 cubic yards of material moved. [App. 3974.] Then, PHC presented an expert witness, Whittaker, of unquestioned credentials as to how to compute the earth movement. [App. 1179.]

The City tried to rebut that testimony with an unqualified "expert" whose credibility was impeached. PHC presented witnesses that proved his testimony was false. [App. 1983, 2159, 2166, 2177, 3180.] Lastly, the City's own expert testified that 16,000 yards were not moved, his calculations being consistent with those of PHC's engineer. [App. 1162.]

As to the City Planning representative (Sentz), the inflammatory memorandum he prepared, combined with his guessing at the earth movement over a site he did not see before the earth was moved and considering the obvious hostility of the Planning Department, who on

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1 The record is replete with proof that more than 16,000 yards of earth were not moved and that it was proven the City was aware of this. See, Consol. Cross Appeal Br. at 10, 12, 15; App. 1162 - Easton Test.; App. 1303 - Berardi Test.; Judge Gallo Op. The proof of the City's intentions is replete within the record. [Consol. Cross Appeal Br. at 14, 15.] Moreover, the revocation of the permits came after the parking lot was completed, after all land operations were completed, but within days of the proposed opening of the parking lot. Lastly, after the verdict in favor of PHC on liability and after the Court indicated its permits would be returned, the City, seven years after denying it took the property by inverse condemnation, reversed its stand and admitted that it had taken the property seven years before.

occasion wanted to control the development of the property, was accused by Imhoff of holding up projects for its own purposes and evinced anger that PHC even acquired the property, it is easy to see why the jury accorded no credibility to it. [App. 798-803.] In fact, its director, who attended the alleged meeting during which revocation was agreed upon, gave a different reason for revocation, i.e. the pressure of the community. [App. 782-787.] In fact, the later acquisition of the property by the City evidences that the City desired the property. It just did not want to have to pay for it. When it saw it lost the verdict, it then accepted the property to avoid damages.[2] This panel seems to give credence to the off hand estimate by Sentz, who made no engineering calculations in spite of the overwhelming expert testimony and prior holding, that 16,000 c.y. were not moved.

Aside from the items discussed above, the only other item mentioned by the Panel as a basis of revocation, was lack of a storm water management system. [Op. at 7.] However, there was a system in place and the area did not require a system at this time. This was recognized by the City's own engineer. [App. 3170.]

This Panel stated that after the meeting, Sentz concluded that all permits should be revoked. All of Sentz' conclusions were discredited (they are discussed above). Moreover, as discussed above, Sentz's objectivity could easily have been questioned by the jury.

During oral argument, counsel for the City suggested the last minute acquisition was due to a change in administration. However, Mayor Murphy had been the Mayor during at least two years before the March 8 admission. Apparently, as long as PHC had to pay the mortgage, the City expected to obtain the property at a distressed price. When it learned the jury ruled in PHC's favor and the judge was going to charge on damages, it thought it could avoid the damages by acknowledging that which it had denied for seven years, that it had taken the property.

The Panel went on to say:

> On November 6, 1989, City Officials from the various departments involved in the matter met to discuss revocation of the permits. At the end of the discussion, they reached a consensus and all present agreed that the permits should be revoked.

[Op. at 8-9.] This is one of the areas in which we expect the jury found pretext. No one who attended the meeting was able to testify as to any specifics of the meeting or what happened. They all used the word "consensus".

The closest to specificity was the Mayor's secretary, Joseph Sabino Mistick. He testified his concern (he did not testify that this was discussed at the meeting, it seemed to be a private concern) arose from his experience as a volunteer fire fighter. He was concerned that the fire engines could not access the property in an emergency. This theory was refuted when the City installed the Jersey barriers to prevent all access to the area. [App. 1708.] Thus, what might have been difficult, became impossible. The passages cited from the meeting were all debunked during trial. [Op. at 9.] The "excessive overburden" was resolved by the agreement with the Water Department with PHC to install a new line during the following year. The "overburden" on the Duquesne Light line had been resolved months before, and it was known to City personnel. Lastly, the operations of PHC did not cause the landslides. The City acknowledged this. [App. 3127, 3061, 3083, 3109, 3455, 3176, 3198.] In fact, PHC's operations stabilized the hillside.

The Panel states that at the community group meeting held on November 9, 1989, the City informed the residents that PHC's permits would not be reinstated until "he submitted a plan to correct the landslide, drainage, and utility problems and complied with other documentation procedures required by the City." [Op. at 9.] However, these issues had already been resolved. The plot plan PHC submitted was sufficient as the initial documentation until other information was requested. No additional information was requested until after the permits were revoked. The sewage problem was not only not of PHC's making, but it was for the City to remediate. Lastly, the landslide was not caused by PHC's work. In fact, there were no further landslides

after the City corrected the runoff from its own road and ordered the neighbor on top of the hill to stop dumping.

The Panel then made a hyper-technical interpretation of the Geomechanics letter, to the effect that the use of the words "dangerous and hazardous conditions have not been created to the degree indicated by the city of Pittsburgh" meant Geomechanics found fault with PHC's work. However, the body of the letter and the documents make it clear that Geomechanics did not find fault with PHC's operations or that they created any hazardous or dangerous conditions. In fact, PHC removed the hazardous condition, large quantities of junk and debris. [App. 1496.]

The Panel stated that the case in Commonwealth Court "became moot when the City placed barriers around a portion of the property." [Op. at 10]. That was not true. The case became moot when, seven years after denying that the City took PHC's property, it admitted it when it thought this admission would reduce the damages to be paid. The case was mooted when the City admitted ownership.

We have difficulty seeing how the Panel could hold there was not sufficient evidence to support the verdict. Apparently, the Panel believed that damages would only apply to the twenty-one day period from the revocation to (November 9) the admission of the taking (December 1, 1989), minimizing the seriousness of PHC's claim.[3] However, even though there is a fiction of taking that relates back under state law, PHC did have to pay taxes and interest to protect the property through March

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[3] Interestingly, the City, in the proceeding now pending before the Board of Viewers for the determination of damages for the taking, is now arguing that it did not have possession of the property until some much later date than December 1, 1989, arguing that damages for delay (interest) do not accrue until sometime in 1993 or 1994, leaving this case with a possible claim for four years. The City has constantly taken contrary positions -- the basis for the Motion to Dismiss Appeal and for Sanctions. That motion was not based on the inadequacy of the City brief as indicated by the Court, but on the misrepresentation during the trial, and the subsequent admission as reflected in the state proceedings.

of 1996. Until February of 1997, it paid over $800,000 in interest to prevent foreclosure. No taxes were paid, but only because of an order preventing a sale for unpaid taxes. In fact, the taxes outstanding, with interest and penalties, exceeded $500,000. This was not an eminent domain loss, but a due process loss, the loss of the right to use of the property, despite the fiction of City ownership "as of December 1, 1989." The Panel should not make fiction fact.

The Panel seemed to focus on two issues, one of which was not raised by the parties.

The jury had several considerations that could lead it to believe the City action was pretextual. First, the meeting of September 21 seemingly resolved all legitimate issues between PHC and the City. However the area residents still complained that they did not want a parking lot in the area. Second, the City waited until all the work was finished before revoking the permits, permitting PHC to work from September 21 until November 9, 1989. As of November 1, 1989, the City issued PHC all requisite permits for use of the parking lot. All that remained for PHC to do (as instructed by the City, App. 3153) was fence in the area and install a barrier around the fire hydrant (which would have rendered it inaccessible) in order for the lot to be operable. How did revoking land operations permits solve anything? It was unnecessary, as all of the work had been completed. It was the occupancy permit that was important to PHC. The City took no remedial action to the areas it deemed so significant. It did nothing about the landslide. It did nothing about the erosion and sedimentation. It did nothing to remove the fill that it claimed was a problem. It did not install the new water line, uncover the manholes or remove the "overburden". It has not done so in the year since it acknowledged ownership of the property. The jury may not have known about the last year, but they saw the property at the start of the trial (a view of the site was taken) and could see that nothing changed since November 9, 1989. If the "overburden" and the fill and the access, etc. were all such problems, why did the City do nothing about them? What the jury saw was more convincing than all of the testimony. The parking lot was complete and unused and nothing had been done in over six years to ameliorate what the City and the Panel reference as "dangerous and hazardous" conditions. It was simple for the jury to conclude that those conditions were not only obviously neither

dangerous nor hazardous, but if they were, they were not sufficiently so for the City to do or order anything done to ameliorate them.

Further, on numerous occasions, the City chose to meet with Gross on behalf of PHC, and as reflected in the September 21, 1989 meeting, obtain information and expert advice, such as from Geomechanics and Deglau. However, the "consensus" meeting attended by the City department heads not only failed to invite Gross, it also did not include any experts, nor were minutes maintained (there was a reference to minutes, but they were never found). Certainly, the jury could find that this clandestine meeting, coupled with the lack of any person's recollection of anything specific occurring at the meeting, other than a "consensus", could reflect the sinister purposes previously discussed -- that the City desired to control the property and would not permit a parking lot to be operated there, despite PHC having all of the permits and meeting the objective requirements therefor. This was not rationally related to a legitimate government interest. This was the improper motive referenced by this Court in Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993).

While the Panel discussed collateral estoppel in conjunction with the state court's reinstatement of the permits, it did not discuss the effect of the judicial admissions resulting from the withdrawal of the preliminary objections in the state eminent domain case. While the Panel may distinguish the state findings concerning the permit reinstatement from a civil
rights' case requirements, the underlying facts admitted by the withdrawal of the preliminary objections cannot be lightly dismissed.

It seems as though the Panel has permitted its opinion to reflect the arguments of the City, that were rejected by the jury.

The Panel noted the possible applicability of Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) and Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986). As we stressed during oral argument, Villager Pond, Inc. v. Town of Darien, 56 F.3d 375 (2d Cir. 1995) made clear that the taking doctrine of Williamson did not apply to a due process case. And, as indicated in Miller & Son Paving, Inc. v. Plumstead Twp., bucks County, _ Pa. Cmmwlth._, 680 A.2d 5 (1996), the requirement of a favorable decision on the permit issue as a precondition to a taking claim, would rule out

the applicability of Williamson, even if this was a taking case. It was not. The claim was for due process violations. It was only on March 8, 1996, after the trial of the case, that taking became an issue.

The foregoing argument consumed most of this counsel's attention during oral argument and thus, we were unable to explore the fact issues, although the Panel initially informed us that would be the subject for argument.

In addition, the Panel seemed concerned that there could be a double recovery, for the civil rights case and for the eminent domain case. However, the damages in the civil rights case are not necessarily the same as in eminent domain. In the civil rights case, we claim loss of revenue as the measure of damages. In the eminent domain case, it is the value of the property plus detention damages, which are akin to interest. Moreover, the City is seeking to deny even a single recovery, by asserting in other proceedings, contrary to the admission there and here, that the City did not have possession of the property in 1989. In any event, the state courts have the power to prevent a double recovery.

CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that the Panel's decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the Untied States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to wit, the Panel's decision is contrary to the decision of this Court in Gebhardt, v. Wilson Freight Forwarding Company, 348 F.2d 130 (3d Cir. 1965); Yohannon v. Keene Corporation, 924 F.2d 1255 (3d Cir. 1991); Beebe v. Highland Tank and Manufacturing Company, 373 F.2d 886 (3rd Cir. 1997); Wilks v. Reyes, 5 F.3d 412 (9th Cir. 1993); Carey v. Piphus, 435 U.S. 247 (1978); Beach v. KDI Corp., 490 F.2d 1312 (3d Cir. 1974); Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973); and Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993).

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: /S/Maurice A. Nernberg
Maurice A. Nernberg

CERTIFICATE OF SERVICE

I, Maurice A. Nernberg, hereby certify that two (2) true and correct copies of the within **Petition for Rehearing** was served upon all parties to the within matter, by first-class, postage paid mail.

George R. Specter, Esquire
City of Pittsburgh
Department of Law
313 City-County Building
Pittsburgh, PA 15219

Date:_____

/S/Maurice A. Nernberg
Maurice A. Nernberg

APPENDIX I

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UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 96-3242
No. 96-3267

SOL GROSS, an individual, and
PANTHER HOLLOW CORPORATION,
Appellees,

Vs.

THE CITY OF PITTSBURGH,
Appellant.

(W.D. Pa. C.A. 91-1895)

MOTION TO DISMISS APPEAL AND FOR SANCTIONS

Appeal from Judgment of the United States
District Court for the Western District of
Pennsylvania in favor of Panther Hollow
Corporation dated March 25, 1996

Maurice A. Nernberg
Pa. I.D. No. 00127
MAURICE A. NERNBERG & ASSOCIATES
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334
Firm No. 331
Counsel for Appellees

ARGUMENT

AND NOW, come the Appellees, Sol Gross, an individual, and Panther Hollow Corporation, by and through their attorneys, Maurice A. Nernberg & Associates and file the within Motion to Dismiss Appeal and for Sanctions:

I. FRAUD UPON THE COURT

1. We make this motion only after much consideration. However, we believe the conduct of the City of Pittsburgh (hereinafter, "City") sufficiently egregious to ask the Court to consider this motion. This Court has authority under L.A.R. 27.4 and 107.2 to entertain this motion. See also Benites v. Hampton, 123 U.S. 524 (1887); Keely v. Ophir Hill Consol. Min. Co., 169 F. 601 (8th Cir. 1909); Wegner v. Bobbitt, 263 F.2d 480 (D.C. Cir. 1920); Fink v. Continental Foundry & Machine Co., 240 F.2d 369 (7th Cir. 1957); Kremer v. Clarke, 285 F.2d 735 (6th Cir. 1960); Smith v. U.S., 368 F.2d 683 (3rd Cir. 1966); Cyc. Fed. Prac. §63.50 et seq..

2. The City Brief refers to an Eminent Domain case (sometimes referenced as a Petition for Appointment of Board of View) at pages 4, 8 and 11, pending in the state court. That case is concluded, except for the assessment of damages.

3. The record contains the petition for the appointment of a board of view as Exhibit "B" to the "Brief of the Defendants, City of Pittsburgh, Mary Conturo, Dominic Cimino, Jane Downing, Maureen A. Hogan, Fred Reginella, Bernard Liff, Eugene V. Dotter, Anna Marie Guzman, Arthur C. Shock, The Board of Standards and Appeals and George Fisher in support of Motion to Dismiss, Motion for More Definite Statement, Motion to Strike and Motion to Abstain" entitled "Petition for Appointment of View Pursuant to 26 Pa.C.S.A. §1-502(e)" (hereinafter, "Petition"). A copy is appended hereto as Attachment A.

4. The Petition was filed on February 26, 1990, and alleged the following facts:

> 6. On or about December 1, 1989, the CITY placed concrete barriers across both means of access to Panther

Hollow Corporation's property. The aforesaid barriers were placed directly on the property of Panther Hollow Corporation, without its permission, and without any prior notice to Panther Hollow Corporation.

7. The aforesaid placing of the barriers by the CITY has completely deprived Panther Hollow Corporation of access to its property, and has seriously interfered with Panther Hollow Corporation's plans for future development of the property. The placing of such barriers constitutes part of a concerted effort by the CITY to gain control of the property and to prevent its use by Panther Hollow Corporation.

8. In addition to placing of the barriers, the CITY has also improperly refused to permit Panther Hollow Corporation to use and develop the property. Thus, the CITY has improperly failed to issue permits for the use of the property and has harassed Panther Hollow Corporation by improperly revoking permits which were lawfully issued.

9. In addition, the CITY has dumped debris on the property and has used the property as a waste site. The CITY has also permitted neighboring property owners to illegally discharge sewage onto Petitioner's property and has refused to correct the situation.[1]

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[1] Three issues were rendered moot by the verdict. The Court proposed serial verdicts if the "permit revocation" issue was decided adverse to PHC (see Appellant's brief, page 4). First, the "jersey barrier" issue. Second, that the City threatened to arrest Mr.Gross and any workman found working after the permit was revoked, despite there being no ordinance to permit arrest (see Exhibit 77, A-3176). Under the ordinance, PHC was permitted to continue work despite the revocation, Title 10, Chapter 1007,

The foregoing are similar to the allegations in this case, Complaint, A-31-49.

5. As the City Brief states, the City filed preliminary objections to the Petition. The preliminary objections appear with the Appendix to Brief to Motions for Summary Judgment and a copy is appended hereto as Attachment B. The preliminary objections generally denied the allegations of the Petition.

6. The complaint in this case was filed on November 4, 1991.

7. On March 8, 1996 at about 4:00 P.M. on the Friday before the expected charge and closing on damages, following eight weeks of trial, the verdict on liability, the taking of testimony on the issue of damages and numerous conferences with the court over the issue of damages, the City withdrew the preliminary objections.

8. A short analysis of Pennsylvania Eminent Domain law is in order, to explain the effect of the withdrawal of the preliminary objections:

> a. Under Pennsylvania law (26 Pa.C.S.A. §1-101, et seq.), a *de jure* condemnation occurs with the filing of a declaration of condemnation by a governmental authority. If, however, the government so restricts the use or effectively takes the property without a declaration of taking, it is a *de facto* taking but is governed by the Eminent Domain Code, (26 Pa.C.S.A. §502(e); Millcreek Township v. N.E.A. Cross Co., 152 Pa. Cmwlth. 576, 620 A.2d 558 (1993), pet. for all. of appeal denied, 537 Pa. 655, 644 A.2d 739 (1994), although the procedure is different. The procedure is established by case law and cannot be simply gleaned from the statute.
>
> b. To assert a *de facto* condemnation claim, a

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§1007.2, subsection 124.11 of the City Ordinances (this was not reproduced). Third, that the hearing before the Board of Standards and Appeals was violative of Petitioner's right to due process.

petitioner must file a petition for appointment of view which sets forth the facts that the petitioner alleges constitute the taking.

c. If the condemnor disputes the allegations, in the petition, it may file preliminary objections within 30 days of the petition, see Janeski v. Borough of South Williamsport, 58 Pa. Cmwlth. Ct. 369, _ A.2d _ (1981). The court must determine first whether the averments state a cause of action as a matter of law, Department of Transportation v. Mano, 149 Pa. Cmwlth. 337, 613 A.2d 119 (1992). The court will then hold an evidentiary hearing, Millcreek Township, supra, Municipality of Monroeville v. Prin, _Pa. Cmwlth._, 680 A.2d 9 (1996) to determine if there is a taking. If the court decides in favor of the petitioner, the procedure follows that of a *de jure* taking.

d. Preliminary objections are the exclusive means to test the legal and factual sufficiency of a petition for board of view. Preliminary objections in *de facto* taking cases serve a broader purpose than in other cases. Reidel v. County of Allegheny, 159 Pa. Cmwlth. 1325, 633 A.2d 1325 (1993); Stein v. City of Philadelphia, 125 Pa. Cmwlth. 230, 557 A.2d 1137 (1989); Hall v. Middletown Township Delaware County Sewer Authority, 75 Pa. Cmwlth. 181, 461 A.2d 899 (1983).

e. If the condemnor does not file preliminary objections or the objections are dismissed (withdrawal is unusual - it has the effect of not filing the objections), the allegations of the petitioner, so far as the taking is concerned, are accepted as true and become final. Dismissal of the preliminary objections is considered a final order, North Penn Water Authority v. A Certain Parcel of Land Identified by Last Known Owner and Tax Parcel Number as Michael H. Malin and Dorothy Seimel Malin, 477 Pa. Cmwlth. 1994, 650 A.2d 1197 (1994).

9. By withdrawing its preliminary objections, the City admitted all of the allegations in the petition: that it took the property, that it put up the jersey barriers to prevent use by PHC, that it refused to issue permits and wrongfully revoked permits previously issued. In effect, it mooted the eight week trial, by admission. The City, at this very moment, in this very Court, continues to deny that it took the PHC property, even though it already admitted that it did. It is more than res judicata or collateral estoppel, it is a judicial admission. One cannot "play fast and loose with the court" Resolution Trust Corp. v. Farmer, 823 F. Supp. 302 (E.D. Pa. 1993); Tops Apparel Mfg. Co. v. Rothman, 430 Pa. 583, 244 A.2d 436 (1968).

10. By withdrawing the preliminary objections, the City acknowledged it was not telling the truth for six years. When counsel for the City informed the court that it had withdrawn the preliminary objections, with the very intention of mooting the eight week trial, and argued that damages should be limited to a 12 day period, the court was incensed and rightfully so. The trial judge indicated that the conduct "is almost unethical", A-2747. While the ethics issue was not paramount in our minds at the time, with the immanency of closing on damages that morning, we now turn our attention to it. It was not almost unethical -- it was unethical and constituted a fraud on the court, PHC and its counsel.[2]

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[2] The withdrawal of the preliminary objections was for the specific purpose of mooting the court action, as the record discloses:

> Mr. Specter: I think the fact of it is that title vests in the city as of -- I think the date was December 1st, 1989, but I'm having somebody -- I came directly here from home, so I didn't bring that file with me, but -- I believe it is December 1st, 1989, but we can verify that.

11. The resolution of preliminary objections by withdrawal is a final order on the factual issues concerning the illegal taking of the property by the revocation of permits and the installation of the jersey barriers (valuation is all that is left). Consequently, collateral estoppel and judicial estoppel both apply. The City can no longer dispute what it has admitted. This issue was raised in the context of damages, by PHC in the discussion with the Court and a "Memorandum on City Withdrawal of Preliminary Objections Relative to the DeFacto Condemnation" which was filed but not reproduced, Attachment C hereto.[3] Thus, the only issue in this case is that of damages, for which there is a cross appeal. The state court will determine the property value and other matters permitted under the Eminent Domain Code.

12. In effect, the City told the court on March 8, 1996, after trial had been in progress for eight weeks, that "we lied. All of our denials were untrue. Since we lied, we should go back to state court and deal with the problem there. Sorry we wasted your time for these last six years. So long. Tell the jury good-bye for us!"

> I think that effectively moots this case, this civil rights case from that date forward, that they're entitled I think to whatever the period is, 21 days' damages or something like that, for civil rights, and I think we go back to the State Court and determine the valuation of the property.

[3] The City would argue that the state taking occurred on December 1, 1989 and the Federal taking occurred on November 9, 1989, However, by admitting the jersey barrier issue, the taking occurred for both purposes no later than December 1, 1989. The Petition references the revocation of permits as a basis for the *de facto* condemnation -- the City admitted it and that is established as November 9, 1989. It is all, likely, *de minimis*.

13. The trial judge took the withdrawal of objections as an attempt to divest the court of its jurisdiction and to obviate the adverse verdict. The charge had already been written and reviewed by both counsel. The damage issue had been the subject of several judicial conferences. It was approximately 9:30 A.M. and the jury was waiting. Thus, the Court decided to go ahead without any modification to the charge and to permit the verdict to be reached.

14. While we empathize with the trial court and admit to our own frustration, the admission cannot be ignored. To admit, 6 years after the event, that the City's defenses were a fraud on the court and parties, is reprehensible. Not to mention the strain on the principals of PHC, whose life savings were tied up during this period during which they paid out over $800,000 in interest to protect their position.[4] Due to the actions still being taken by the City, PHC and its principals have not been reimbursed, nor paid for the property -- not to mention the emotional trauma.

15. No F.R.C.P. 11 or F.R.A.P. 38 motion was filed. Now that we have reviewed the City Brief, we consider it appropriate. We did not pursue an F.R.C.P. 11 motion because our clients, who are in their 70's, wanted an end to this terror after 6 years. In addition, the City is also liable for attorney's fees and costs in this action under 42 U.S.C. §1983 so that Rule 11 provided no relief. However, in light of the City's perseverance, we now ask the Court to consider sanctions under F.R.A.P. 38 (we are aware of the requirement of a separate motion, or notice from the court, and ask the court to issue such notice if this motion is not sufficient), Roadway Express, Inc. v. Piper, 447 U.S. 752,

[4] The City brief states that "Panther Hollow did not pay any taxes during the period in question. (footnote 1, page 10)." What the City fails to mention is that the property was burdened by over $500,000 of liened taxes and penalties. Moreover, were it not for an order from the Court of Common Pleas of Allegheny staying a tax sale, PHC would have been subjected to the loss of its property. The principals of PHC suffered terribly during this period; a reason for the cross appeal on the issue of damages for Mr.Gross.

767 (1980) and L.A.R. 27.4.

WHEREFORE, based upon the foregoing, we ask this Court to dismiss the appeal of the City and impose appropriate sanctions.

II. FAILURE TO COMPLY WITH APPELLATE RULES

16. Before its brief was due, the City asked for and was granted an additional thirty (30) days for filing, which was opposed by PHC for the reasons stated in its response (which this Court treated as a motion for reconsideration).

17. F.R.A.P. 30 provides that the appellant is to designate the contents of the appendix no later than ten (10) days after the date the record is filed if there is not an agreement as to the appendix. The City did not do that.

18. When we did not hear from the City, we sent our letter of September 10, 1996, listing certain items to be included for its cross-appeal and requested that the City designate the proposed appendix (Attachment D) for its appeal.

19. Despite the foregoing, we were not informed as to what was to be included in the appendix, although, by agreement, the City did add items to the Appendix. Apparently, the City was of the opinion that by including the entire trial record as part of the appendix, it fulfilled its obligation under F.R.A.P. 30. We do not agree.

20. In a long trial such as this, coordination pursuant to Rule 30 is essential. A review of the table of contents of the record makes clear how prejudicial it is to ignore the rules. We cannot determine what was excluded from the appendix. Compliance with F.R.A.P. 30 would have avoided that. Some important exhibits were not included, such as 10.2. Having reproduced almost the entire record, the appendix is too voluminous to follow. In addition, the index does not identify exhibits (listing numbers only), which is important when there are hundreds of exhibits. Instead of the Brief and Appendix constituting a guide to expedite review, they are impediments.

21. When we did not obtain a response to our September 10, 1996 fax and the City brief and appendix were filed, we asked for a list of exclusions (fax of September 22, 1996, Attachment E). No response

has been received.

22. In ordinary circumstances, we would request an extension of time. However, for the reasons expressed in the Appellee's Motion in Opposition to Request for Extension of Time, no extension of time is desired as such would be detrimental to the PHC.

23. The City identified four issues for argument (Statement of Issues) but briefed only three.

24. Although stated differently, the first argument, which dominates the City brief, is that the verdict was against the weight of the evidence. The purported Standard of Review is "abuse of discretion." The appropriate standard of review is governed by the 7th Amendment to the United States Constitution, whether the verdict is supported by any evidence. That means it is incumbent for the City to present uncontested facts to support its contentions or present evidence supporting the verdict, but to explain it away. L.A.R. 30.3 requires that all evidence supporting the verdict shall be included in the appendix to facilitate this review process. However, here, no discretion was used. The appendix is not so limited.

25. A condition precedent to overturn a jury verdict is the filing of a motion for judgment n.o.v., Woods v. National Life & Accident Ins. Co., 347 F.2d 760, 769 (3rd Cir. 1965); Charles Jacquin et Cie, Inc. v. Distellaria Serralles, Inc., 921 F.2d 467, 475 (3rd Cir. 1990). The only post trial motion filed by the City is the "Motion for Judgement as a Matter of Law or to Amend Judgment, or in the Alternative Motion for New Trial." The "matter of law" portion of the motion dealt with damages and did not aver that the verdict was against the weight of the evidence. Thus, this Court cannot grant judgment n.o.v.

26. The Statement of Facts disregards all contrary evidence and describes events on which there was substantial testimony for PHC. No attempt has been made to describe contrary evidence and explain it away. Brash statements of "uncontradicted" testimony are set out and not true. Examples follow:

> •The City states (Brief, page 17) that it "produced uncontradicted testimony which showed in fact cuts had been made in the hillside" resulting in a landslide, referencing Volume VII, 1940-42. However, pages 1940-42 appears in Volume VI.

It is the testimony of Mary Conturo, the former City Solicitor. We do not believe she was an expert on soils. In fact, we do not believe that the City produced an expert on this subject. We have not scoured the 4,000 page record to determine whether there was any testimony to this proposition (no applicable expert report was presented), but the record contains testimony that PHC never worked on the hillside.

In a prior proceeding, entitled to issue preclusive affect, Judge Gallo found that "a slide emanated from prior years of dumping" (4a), prior to the PHC purchase (3a) and is safe for its intended use. That case is not referenced in the City brief, but was brought up in a Motion in Limine, Attachment F, and a copy of Judge Gallo's opinion is contained in the "Appendix to Brief in Opposition to Motions for Summary Judgment", Attachment G hereto. In fact, issue preclusion based upon Judge Gallo's decision would have been a basis for cross appeal were it not for the admissions in the Eminent Domain case.

Anthony J. Berardi and Sol Gross, A-1310-11, A-1435, testified that no work was performed on the hillside. Similar testimony came from John L. Skutski, A-1219, who also testified that the hill was saturated from runoff from Swineburn Street, a city street, as did Gross A-1490. No one else worked on the project.

The City meeting minutes for September 21, 1989 (Exhibit 49, A-3127) disclosed the reason for the hillside movement as "rain and instability", with no mention of work by PHC. At that meeting, Gross provided the City a report by Dr. Alvi, a geotechnical engineer, that the PHC work did not affect the hillside.

Exhibit 1 (A-3061), a City memo from 1981, identified the cause of sliding as "Sestelli" (a nursery located above the hill) who threw dirt and topsoil over the hill for years, up to and including the current time. Exhibit 20 (A-3083) a memo from Daniel Feeney, Senior City Building Inspector, confirmed that Sestelli

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was still dumping. Mr.Scuilli, Exhibit 38 (A-3109) confirmed that dumping went on for years.

Exhibit 171 (A-3455), a memo from Fred Reginella, Director of Engineering, confirming that the City employed consultant's report confirmed what both Gross and Geomechanics had told the City on two occasions, the first being as early as September 21, 1989. See Exhibits 88 (A-3176) and 109 (A-3198).

Any suggestion that PHC's work caused the slide was not only contradicted by evidence, but substantial evidence. In fact, there was no substantial evidence supporting the allegation.

•As to the special inspector mentioned at page 6 of the brief, there was no evidence that the City ever required such an inspector and none was required for this project. See A-2871, 2932.

•As to the Allegheny County Health Department "responding to neighborhood complaints" at page 6 of the brief, the complaint was by Sol Gross because the adjacent property was disposing waste on PHC property. Moreover, the evidence showed that PHC did not cause the sewage problem, there had never been sewage to the two subject properties and PHC had no duty to give its property to the use of adjacent homeowners for a sewage disposal area. See Exhibits 66 (A-3146), GGG (A-2962, 88 (A-3176) and 109 (A-3198); A-406-409, A-554-557, A-2949, A-769-770.

•Despite the argument of counsel, the County did not undertake any effort to enforce any action against PHC, who testified that it was in full compliance. See page 7 of the brief.

•As to the water line on page 7 of the brief, PHC was given permission to change the grade of the Boundary Street part of the property by the City (Serpa, A-0954,

0955) and to place fill over it, but the City personnel who authorized that, forgot that there was a water line. Certainly, PHC was not obligated to replace it, but it agreed to. However, the City revocation of permits preceded by almost 5 months the date for submission of plans. See Opinion of Judge Gallo (Attachment G); Exhibit 26, A-940, Exhibit 49 (A-3127), Exhibit 109 (A-3198), Exhibit 57 (A-3137), Exhibit 178 (A-3475) and Exhibit 105 (A-3195).

27. The foregoing only encompasses the first 3 pages of the Statement of Facts. To include citations to testimony and exhibits for each fact would take more than 50 pages. Moreover, there was substantial testimony that the reasons given for revocation were pretextual. For example, Mr.Cimino, the purported author of the revocation letter (Exhibit 76, A-3157) could not identify how it was prepared, A-340-313 (the pages are mixed up). Ms. Downing, the Director of City Planning informed the mayor's assistant that the City would develop the PHC property "with or without Mr.Gross's cooperation", A-798-803. Despite the revocation letter, Exhibit 76 (A-3157), City representatives provided differing reasons for the revocation, such as that it was a "response" to meeting with political action groups in Oakland who were assured a parking lot would not be constructed on the property, A-782-787; despite his own revocation letter, Mr.Cimino attributed the revocation to failure to file subsequent plans and reports, A-326. However, the City did not request any additional plans or reports of PHC prior to the revocation, A-295. And, when PHC did file new plans, the City took 8 months to review them, and then did not provide a direct response, A-335-340, Exhibit 179 (A-3482), A-873. Independent of res judicata, collateral estoppel, judicial estoppel and judicial admissions, there was sufficient evidence of pretext for a directed verdict, let alone a jury finding.

28. Due to constraints on time and paper, we have not produced a similar analysis for each statement contained in the City Brief. However, contrary to F.R.A.P. 28(e), most of the factual statements are not referenced to the Appendix. Thus, the City brief contains unsubstantiated statements. Those that do reference the appendix,

do not reference contrary testimony or exhibits. No attempt is made to explain away the contrary testimony or exhibits, it is just ignored. If the City Brief is allowed to stand, it will mean the City can make bare allegations and we, the verdict winners, are forced to prove to the contrary. That is not how the appeal process works. We can represent to the Court that there was contrary evidence for every proposition put forth by the City.

29. We believe that the rules of professional conduct and the rules of this court require that in the case where there are hotly contested facts, that one arguing that a verdict is against the weight of the evidence has a duty to present the evidence in a fair manner. Or, to at least present contrary evidence and attempt to explain it away.

30. Although, L.A.R. 28.3 obliges a party to disclose the existence of contrary legal authority, we believe the rules of professional conduct, 3.3, and the general requirements of professionalism, require candor to the court. It is one thing to argue that all of the evidence supports a particular proposition, citing contrary evidence as not being sufficient to offset the proponent's evidence. It is another thing to suggest that matters are uncontradicted or to present matters as uncontradicted when they are contradicted. A brief setting forth an argument that the jury verdict is against the weight of the evidence requires an analysis of the evidence, not a disregard for evidence produced by the verdict winner. This is made obvious by L.A.R.30.3. Limiting the appendix is covered by L.A.R. 30.5.

31. This case is similar to Borkowski v. DePuy, Inc. 850 F.2d 297 (7th Cir. 1988), in which the appellant made no attempt to distinguish authority cited by the district court which refuted the his position. Neither we nor the Court should have to review all of that to locate relevant data.

32. We add, that the second and third issues are not better presented. The third argument is without any legal authority whatsoever, suggesting that one trespassed against has a duty to sell his property to "mitigate" damages from the continuing trespass. The second argument is based on a case of Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990) and its assessment of damages and would be dealt with in the cross appeal.

33. We also add that the frivolity of the appeal was exemplified during a very recent settlement discussion with City officials, including counsel and the deputy mayor, in which the deputy mayor made an insubstantial settlement offer followed by a comment on the life expectancy of a man of Mr.Gross's age (75 years). The implication was that the City could drag out the process. This, they have done.

WHEREFORE, it is prayed this Honorable Court dismiss the appeal of the City of Pittsburgh, permit the case to proceed on the cross-appeal and grant relief under F.R.A.P. 38.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: /s/ Maurice A. Nernberg
Maurice A. Nernberg

CERTIFICATE OF SERVICE

I, Maurice A. Nernberg, hereby certify that a true and correct copy of the within Motion to Dismiss Appeal and For Sanctions was served upon all parties to the within matter, by first-class, postage paid mail.

George R. Specter, Esquire
City of Pittsburgh
Department of Law
313 City-County Building
Pittsburgh, PA 15219

Date:_____

/S/ Maurice A. Nernberg
Maurice A. Nernberg

APPENDIX J

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

SOL GROSS, Trustee for PANTHER HOLLOW CORPORATION and PANTHER HOLLOW CORPORATION	)	CIVIL DIVISION
Plaintiffs,	)	
V.	)	No.: GD 90-02794
CITY OF PITTSBURGH,	)	FILE NO: 6389
Defendant.	)	

APPEAL BY CITY OF PITTSBURGH
FROM REPORT OF VIEWERS

The appellant, City of Pittsburgh, files the following Appeal from the Report of Viewers in the above case:

1. The appellant is the City of Pittsburgh ("City"), and the appellees are Sol Gross, Trustee for Panther Hollow Corporation and Panther Hollow Corporation.
2. The property involved in this appeal contains approximately 27.8865 acres, located in the Fourth and Fourteenth Wards of the City of Pittsburgh, Allegheny County, Pennsylvania, and is the property described in paragraph 3 of appellee's petition for Appointment of Board of Viewers ("Board") and ExhibitA attached thereto. The interests of the condemnees in the property is fee simple, and appellee Sol Gross, is Trustee of said property for appellee Panther Hollow Corporation.
3. The proceedings appealed from are those proceedings before the Board of Viewers, at the above GD

number, File No. 6389, the report of which Board was filed on May 19, 1997.

4. Appellant objects to the following in the Viewers report:

(a) The amount of the award;
(b) The finding that no estimate of just compensation payment was made;
(c) That the date of relinquishment of possession of the property by the condemnee was December 1, 1989, and therefore that such date was the date from which to calculate compensation for delay and;
(d) The amount of attorneys' fees and expenses awarded to plaintiffs; i.e., 40% of the total award.

5. A jury trial is hereby demanded.

Respectfully submitted,

/S/George R. Spector
George R. Spector
Deputy City Solicitor

/S/Jacqueline R. Morrow
Jacqueline R. Morrow
City Solicitor

APPENDIX K

MINUTES OF MEETING OF 21 SEPTEMBER 1989

Subject:	Panther Hollow/Boundary Street
Attendees:	Gross, Alvi, Degia, Sciulli, Brown, Imhoff, Feeney, Downing Hogan, Serpa
Proposal:	The total development site consists of 2.4 acres. Initially at the lower end - Saline Street - a parking lot of 550 parking stalls on 5 acres has been approved by Zoning. Other future uses may include warehouse, commercial and residential. The site is currently zoned "M-3".
Current: Status	o The City cited the railroad for a clean-up of the site. In turn, Mr. Gross was authorized to clean the area, as he was purchasing the property from the railroad. o Mr. Gross was given a land operations permit to grade up to 16,000 cubic yards of fill. The site has been closed since 23 July 1989 because haulers have been unable to secure permits to haul fill over City Streets to the site. Mr Gross stated that no more fill was needed. On 9/21/89 Mr. Gross submitted a final survey which shows existing contours. o DPW has given the developer permission to set the grade of the new road, and to develop a temporary asphalt drive to get to the parking lot from Saline Street.

- Legislation has been introduced to City Council by DPW to dedicate the official right-of-way of Boundary Street. Once approved, DPW will set the exact grade, and Mr. Gross will grade accordingly.
- The hillside has moved because of rain and instability.
- In 1983 the Water Department laid a new 16" waterline on the old road ROW since the original lines had been covered by a slide. Due to recent regarding and erosion, 15 feet of fill covers the new waterlines. Some hydrants are inaccessible.

Next Steps:

- Either the fill must be removed to no more than four feet or the waterline must be relocated by the developer. The likely relocation cost of the water is $180,000. The parking lot will not be open until this utility issue is resolved.
- Slag may be put down by Mr. Gross to provide access to two houses at the southern portion of the site.

MINUTES OF MEETING OF 21 SEPTEMBER 1989

- Access to the fire hydrants must be secured.
- The reopening of Boundary Street is problematic. Any discussion concerning this issue - as well as the total development - must go through the Oakland planning process. A conceptual plan has been developed which could be shared with the community. Appropriate geotechnical studies will be made once the development plan is finalized.
- Community meetings will be scheduled with Oakland Directions Inc.

APPENDIX L

CITY OF PITTSBURGH

BUREAU OF BUILDING INSPECTION
OFFICE OF THE CHIEF
DEPARTMENT OF PUBLIC SAFETY

PENNSYLVANIA

November 1, 1989

Panther Hollow Corporation
c/o Mr. Sol Gross
3810 Crooked Creek Road
N. Versailles, PA 15137

Dear Mr. Gross:

To confirm our conversation of this date, the following stipulation must be met before the Boundary Street parking area can open for business.

1) The 6' high chain link fence must be installed around the perimeter of the parking area.
2) A permanent barrier must be provided around hydrant excavation.
3) All cars parked in the parking area must be removed by sundown or approved lighting system must be installed.

Failure to comply with the above stipulations could result in a revocation of both the temporary occupancy certificate and the parking license previously issued.

Yours truly,

/S/Mary Fleming
Mary Fleming
Project Chief

HAND SERVED 11/9/89
RECEIVED BY _____

APPENDIX M

CITY OF PITTSBURGH

November 1, 1989

Mr. Sol Gross
3810 Crooked Run Road
North Versailles, PA 15137

RE: Boundary Street
16-inch waterline

Dear Mr. Gross:

The purpose of this correspondence is to document our conversation at the site on October 24, 1989 regarding the status of our referenced waterline and existing fire hydrants. As we discussed, you are to submit by March 1, 1990 detailed engineering plans and specifications for a new 16-inch waterline, which you will install at your own expense. The plans should include the exact location, depth, and bedding of the proposed waterline, hydrants, and any other related appurtenances. The specifications shall be written to meet the City of Pittsburgh's design and construction standards and the installation of said line shall be inspected and tested by appropriate representatives of the Water Department.

The submitted plans will be reviewed by the Water Department for approval. The review process is expected to be approximately 2-4 weeks. After appropriate authorization, you will begin construction with anticipated completion by June 1, 1990.

With regard to your written request of October 26, 1989 to abandon three (3) fire hydrants on Boundary Street, we have requested the Fire Bureau to perform a safety survey of the development area with respect to fire prevention and other emergency operations. Upon completion of the survey, you will be notified of our decision. Until such time, you will take every

precaution to protect and preserve the existing waterline and hydrants from damage due to your operations.

If you have any questions, please feel free to contact me.

Very truly yours,

/S/Alex G. Sciulli, P.E.
Alex G. Sciulli, P.E.
Director

cc: J. Mistick
J. Turner
J. Downing
L. Gaetano
D. Pellegrini
P. Imhoff
C. Dickinson

APPENDIX N

CITY OF PITTSBURGH

BUREAU OF BUILDING INSPECTION
OFFICE OF THE CHIEF
DEPARTMENT OF PUBLIC SAFETY

PENNSYLVANIA

November 9, 1989

Mr. Sol Gross
Panther Hollow Corporation
3810 Crooked Run Road
N. Versailles, PA 15137

Dear Mr. Gross:

The land operation permit dated July 27, 1989, the temporary certificate of occupancy for a 565-stall public parking lot. No. 1457, dated 10/19/89, and an application for a parking lot permit dated 10/20/89, are revoked for the following reasons:

I. LAND OPERATIONS

Pursuant to Section 1009.11 of the Charter the land operations permit is revoked because you are in excess of the 16,000 cubic yards of fill that you indicated that you were going to place or move. In addition, the fill you placed has a depth in excess of twenty feet, the depth you indicated the fill would be at its deepest point. Dangerous conditions and hazards exit as a result of your land operations. Including but not limited to:

a. Places an excessive overburden on two City sewers and a water line located within the fill are;
b. Is on a City water line, which makes useless City fire hydrants in the area;
c. Places an excessive overburden on a Duquesne

Light transmission;

d. Interferes with sewer system of adjoining property owners;

e. Has caused landslides in the Panther Hollow area;

f. The fill is placed in a manner that will cause excessive drainage in the Panther Hollow-Boundary Street area.

Pursuant to Sections 1009.04 and 1009.07, you are directed not to place any additional fill and cease all operations. Prior to the issuance of a new permit, you're to obtain the services of a soil's engineer that will set forth a general plan:

a. Setting forth the cubic yards and depth of fill that has been placed;

b. Showing the cross sections, present and proposed contours, descriptions of the type of soil and rock strata and any coal workings, known or which after reasonable examination can be ascertained, locatio of utilities, sewers and drains, details of surface protection, walls, cribbing and any other structures on the property;

c. Where the fill is involved, the following additional information;

Plans showing preparation of natural growth surface by benching and removal of top soil, vegetation and other materials:

Description of surface and subsurface draining control; Results of stability and analysis; Descriptions of kind of material to be used in fill; Statement of intended moisture density control of fill; Statement of method of compacting fill and thickness of layers to be used in such compacting; Statement of tests to be made prior to and during the process of filling and the names of persons and agencies responsible for making the tests.

d. You are required, as part of this plan, to provide to the City a corrective plan to eliminate the dangerous and hazardous conditions created by your actions. This should be done within fifteen (15) days of receipt of this letter.

II. PARKING LOT PERMITS AND TEMPORARY APPLICATIONS FOR CERTIFICATES OF OCCUPANCY

Review of your Certificates of Occupancy, as well as the permit to operate a parking lot, indicates that a large portion of the parking spaces are located on Boundary Street. Accordingly, no permit will be issued, separate and apart from the land operations issue, until a new parking plan is submitted showing the location of the spaces.

III. ACCESS

Presently, you have an access road at the lower end f Boundary Street, which is illegal. You are not to use this as an access until you receive a curb cut from the Department of Public Works.

Your failure to comply with any parts of this letter will result in a fine $1,000.00 per day, and other remedies available to the City, both legal and equitable.

Very truly yours

/S/Dominick J. Cimino
Dominick J. Cimino
Assistant Superintendent

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

No. 97-76

In The

Supreme Court of the United States

October Term, 1996

SOL GROSS, Trustee of PANTHER HOLLOW CORPORATION and PANTHER HOLLOW CORPORATION,

Petitioners,

v.

THE CITY OF PITTSBURGH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in concluding that Sol Gross was not entitled to nominal damages, or any damages as the jury found, even though the jury found that his constitutional rights had been violated?

2. Did the Court of Appeals err in concluding that the verdict was against the overwhelming weight of the evidence?

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STATEMENT OF THE CASE

The following are the relevant facts, which together with actions of State and County authorities acting independently of and initially without any knowledge of the Respondent City of Pittsburgh, resulted in the Court of Appeals concluding that "the liability verdict in favor of Panther Hollow was against the overwhelming weight of the evidence". (Pet., 4a).

Petitioners, Panther Hollow Corporation ("PHC") and Sol Gross, an individual, filed an action under 42 U.S.C. § 1983 alleging that the City violated (1) PHC's civil rights by revoking a Land Operations Permit ("Permit") for construction of a parking lot without legal justification therefor; and (2) violating Sol Gross' civil rights by filing a citation against him in City Magistrate's Court for conducting land operations without a Permit, when at the time a Permit in favor of PHC was outstanding. The jury found that filing of the charge violated Mr. Gross' civil rights, but awarded him no damages.

PHC acquired the subject property from CSX Railroad on February 28, 1989, when there was outstanding against CSX a citation by the City's Bureau of Building Inspection ("BBI") to clean up the property because CSX had permitted an accumulation of debris. In May, 1989, Ace Demolition Co., ("Ace") owned by the same shareholders who own PHC, contracted with CSX to do the clean up work. Ace completed the work on June 15, 1989, but then conducted substantial land operations without a Permit. On July 20, 1989, due to complaints from neighbors, the City learned that PHC was hauling fill onto the site without a Permit. Following newspaper articles and a

warning from BBI, PHC stopped the illegal hauling. On July 27, 1989 PHC applied for and on July 28, 1989 received a Permit. The Application contained a representation that PHC's surveyor would be the Special Inspector, whose function it was under the City Ordinance to inspect the land operations, report weekly and make certain that the operations were being conducted in accordance with the Application and applicable law. *Despite such representation, the Special Inspector made no inspection, made no reports and failed completely to conform to law.* On May 16, 1989, Panther Hollow applied for a parking lot permit. The Application contained a question as to whether the property was located in a landslide prone area, which it was, but PHC represented that it was not. That misrepresentation later became relevant because there was a landslide during PHC's operations.

On July 20, 1989, the Allegheny County Health Department, responding to neighborhood complaints, investigated PHC's activities and found that the land operations had destroyed two sewage systems of adjoining property owners, thereby *causing raw sewage in the form of human fecal matter to discharge upon the property of the neighbors and PHC.* The discharge was patently visible, but PHC refused to take any action to clean it up, or to permit public officials to enter upon the property to clean it up. The Health Department as it had the legal right to do, directed the City to take appropriate action to terminate violations of the County Health Code. In addition, the County inspection determined and the City was so advised that PHC created an excessive overburden on the property and was otherwise in violation of County Ordinances and State statutes and regulations. Further, an

adjoining hillside under a major City street was sliding endangering the street and homes on the hillside. In response to a referral from the County Health Department, the State Department of Environmental Resources ("DER") conducted an inspection on July 27, 1989, and cited PHC and Ace for violations of the State Stormwater Management Act and DER statutes and regulations regarding erosion and sedimentation controls. *Despite such citations, neither PHC nor Ace ever took any action to abate the violations.*

PHC buried a City water line under an excessive amount of fill and after warnings by the Water Department, PHC agreed to relocate the line. Despite its agreement, it never submitted plans nor took any action to effect the relocation. PHC buried manholes which provided access to a storm sewer, and placed ten to twelve feet of fill around a fire hydrant so that a hose could not be attached to it. These actions were the subject of numerous complaints from neighbors and newspaper publicity. Subsequent to July 27, 1989, in response to neighbor complaints, various City officials and employees inspected the property, and the County Health Department continued to direct the Mayor to abate the violations, and finally recommended to the City that the Permit be revoked.

In an effort to resolve the dispute, a meeting was held on September 21, 1989, as a result of which PHC continued construction, *but there was no discussion of the sewage discharge problem, the DER violations or resolution of the instability of the hillside.*

In October, 1989, PHC applied for a Temporary Occupancy Permit to open its parking lot. The application was granted, but was signed by Paul Imhoff, chief of BBI, even though the Application required approval by a Senior Inspector of BBI.

In October, 1989, a City environmental engineer inspected the property and found serious violations of the City Code, State statutes and regulations, County health regulations, and among other things that PHC had moved more than 16,000 cubic yards of material, which was an amount that required a Conditional Use Application under the City's Zoning Code for land operations of that magnitude. On October 24, 1989, the County Health Department held a meeting attended by Health Department employees and City employees, and at that meeting the County specifically recommended that the City consider revocation of the Permit. That recommendation was set forth in a letter of November 9, 1989 to the Mayor (App. 1).

On November 6, 1989, a meeting of City officials involved in various aspects of the matter met and a consensus was reached to revoke the Permit, which was done by letter of November 9, 1989. (Pet. 87a)

The Complaint named as defendants the City, various City officials, a number of neighborhood residents and several neighborhood community groups. Summary judgment was granted in favor of the individual residents and neighborhood groups, and the individual City defendants because they were acting in their official capacities.

Certain state proceedings are also relevant. On December 1, 1989, for reasons of public safety, the City

placed jersey barriers around a portion of the property, and PHC filed in the Court of Common Pleas of Allegheny County a Petition for the Appointment of a Board of View alleging a de facto taking resulting from placement of the barriers. The City filed Preliminary Objections to the Petition. No action was taken by either party until March 8, 1996, three days before the damage verdict in the federal case, when the City withdrew its Preliminary Objections thereby effectuating a de facto taking of the property as of December 1, 1989. The City and PHC are now litigating the fair market value of the property in the Court of Common Pleas.

At trial, testimony and exhibits amplified and added to the above facts to the extent that the evidence of improper activities and unlawful conduct of PHC was truly overwhelming.

Larry K. Stefl, of the County Health Department testified that the Department became aware of PHC's activities around the middle of July, 1989, and based upon an inspection on July 20, 1989, he concluded that there were environmental and health violations. The Health Department referred the matter to DER, and on July 27, 1989, a DER inspector cited PHC for failure to have erosion and sedimentation control mechanisms in place, citing violations of the Environmental Resources Erosion Control Regulations, 25 Pa. Code § 102.1 et seq., adopted under authority of the Clean Streams Law, Pa. 35 P.S. § 691.1 et seq. The DER inspector also issued an Earth Disturbance report which set forth specific violations of environmental laws and regulations (App. 5). *It is critically important in this case on the issue of whether the City violated PHC's civil rights, that two governmental entities,*

totally independent of the City and acting initially without the knowledge of the City, concluded that there were serious violations of health and environmental laws. The citations directed PHC to submit a statement within fifteen (15) days as to how it intended to cure the violations and comply with law, but PHC *never* responded to the citations.

The most serious of PHC's operations as they related to public health was that during the land operations the septic systems of two adjoining houses were disrupted resulting in human fecal matter being discharged to the surface. PHC denied responsibility, but it was undisputed that the disruptions and discharges began during PHC's operations. PHC refused to permit public authorities to enter upon its property in order to abate the condition. This reprehensible condition continued for a period of approximately eight (8) months from July, 1989 through March, 1990, despite rising public clamor and political calls for an end to the situation. Finally, by letter of February 28, 1990, the County Health Department cited Ace and ordered it to abate the condition (App. 7). By letter of March 20, 1990, the Health Department cited PHC and ordered it to abate the condition (App. 9). In response to those citations, PHC granted an easement for a sewer line, and the City then installed public sewage at a cost of $48,000.

By letter of July 24, 1989, from the Deputy Director of the County Health Department to the Mayor of the City, the Department advised the City of its inspection on July 20, 1989 and directed the City's attention to possible violations of laws and regulations and other potential impacts upon public safety such as the stability of an

adjoining hillside, the adequacy of fire protection for the homes adjacent to the site and possible impact on bridge supports in the area (App. 11).

During PHC's operations, a steep hillside adjoining the property became unstable and landslides occurred. PHC denied responsibility, and contended that its operations did not involve cutting into the hillside. The City produced uncontradicted expert testimony which showed that in fact cuts had been made in the hillside. Significantly, the July 24, 1989 letter from the Health Department questioned whether the hillside was stable and would remain stable. A City Engineer testified that there were landslides patently visible and fissures in the ground, and the City's former superintendent of BBI testified that there were fissures visible in the ground. The seriousness of the landslide was compounded by another PHC dereliction. In May, 1989, PHC applied for a Parking Lot License, and the application contained a question as to whether the property was in a landslide prone area. Despite such question, PHC, although it knew that the area was landslide prone and in fact had knowledge of prior landslides in the same area, answered "none" on the application. If the question had been answered truthfully, in conjunction with issuance of the Permit, appropriate conditions could have been attached to ensure against another landslide.

The sewage discharge problem continued from its onset and finally by letter of October 6, 1989 (App. 14), the County Health Department wrote the Mayor advising that the presence of malfunctioning/inadequate sewage disposal systems had been verified and advised *"that this discharge of sewage poses a potential danger to the health of the*

public since the sewage is accessible to insect vectors which may transmit diseases and constitutes a health hazard under the Local Health Administration Law, Act 315". (emphasis added) The City was further advised that the sewage discharge constituted a violation of the Pennsylvania Clean Streams Law, Pa. 35 P.S. § 691.1, and the Pennsylvania Sewage Facilities Act, Pa. 35 P.S.750.1. Most critically, the County advised that "Sewage within the confines of municipal boundaries is the responsibility of the municipality". Thus, the City was required as a matter of law to follow the County's direction and take necessary action to stop the discharge. At this point in time, October 6, 1989, the City had not taken action to revoke the Permit, and PHC had never responded to the DER citation which directed a response within fifteen (15) days of August 1, 1989. In fact, as admitted at trial, PHC never responded at all to the citations.

As a result of the October 6, 1989 letter, a meeting was held at the Health Department on October 24, 1989. That meeting resulted in a letter dated November 9, 1989 from the Health Department to the Mayor (App. 1), in which the Health Department stated that "The City should consider having Mr. Gross cease all activities until such time as he has addressed the concerns outlined above and is in compliance with all permit, planning, and operational requirements." Coincidentally, the City had by its own letter of November 9, 1989 revoked the Permit, but the Health Department's letter evidences unequivocally that it was the County which recommended revocation of the Permit prior to the City's actual revocation.

On October 20, 1989, representatives of the City Planning Department inspected the property, and Daniel T.

Sentz, an environmental engineer, reported his findings by memorandum of October 25, 1989, in which he recommended that all permits be revoked and all work stopped. (App. 17).

A review of the chronology of violations also shows that land operations were being conducted prior to July 27, 1989, the date on which PHC actually applied for a permit. That is proven by the Health Department inspection on or about July 20, 1989 and the DER inspection on July 27, 1989 which resulted in the citations.

The application for the Permit stated that the Special Inspector for the project was a licensed surveyor who had provided various surveys of the property for PHC, however, *the inspector never performed any inspection services at all.*

ARGUMENT

I. THE REASONS ADVANCED IN SUPPORT OF THE PETITION DO NOT MEET EVEN MINIMALLY THIS COURTS CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

The decision of the Court of Appeals was essentially fact based, but measured of course against the standards that a plaintiff must establish to prevail in a 42 U.S.C. § 1983 action. The court made this clear when it stated "Clearly the verdict was against the overwhelming weight of the evidence because there was no basis on which the jury could have found that the city deprived Panther Hollow of its substantive due process rights

under section 1983 by arbitrarily and irrationally revoking its permits". (Pet. 13a).

Sup.Ct.R. 10(c) states "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . . " Also, the considerations set forth in Sup.Ct.R. 10(a) governing review on petition for certiorari relating to a decision of a Court of Appeals when applied to the facts of this case show unequivocally that the decision was not in conflict with that of another Court of Appeals, and that no important federal question is involved in this factual decision. For such reasons alone, certiorari should be denied.

II. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT SOL GROSS WAS NOT ENTITLED TO NOMINAL DAMAGES EVEN THOUGH THE JURY FOUND THAT HIS CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED.

First, there is a fundamental misstatement of fact in the Petition. In both the first Question Presented for Review and in the title of Argument I (Pet. 22), Petitioners state that Sol Gross was arrested at the time he was served with a citation for working without a permit. This assertion is simply not true, and is not supported by any evidence. The sum and substance of the facts are that a building inspector, acting on orders from the superintendent of BBI, served a citation on Mr. Gross for working without a permit. Subsequently, the inspector, who was not regularly assigned to that geographic area, checked the file and learned that a permit had been issued to PHC, so he then withdrew the citation. A citation for

violation of a City Ordinance is a summary offense, the lowest form of offense in Pennsylvania, and a building inspector has no arrest powers. The incident can be accurately characterized as a mistake, amounting in law to at worst negligence, rather than as claimed here a denial of constitutional rights.

A review of the three cases cited by petitioners, *Carey v. Piphus*, 435 U.S. 247 (1978); *Farrar v. Cain*, 756 F.2d 1148 (5th Cir. 1985) and *Morrison v. Stepanski*, 839 F.Supp. 1130 (M.D. Pa. 1993) support Respondent's position on the issue at hand. Those cases stand only for the proposition that a plaintiff who has sustained a civil rights violation, but no actual injury is entitled to nominal damages *only when a fundamental right has been violated.* In *Carey* supra, this court held that denial of a hearing to a high school student suspended for twenty (20) days for possessing a marijuana cigarette, was a denial of a right so fundamental that nominal damages were appropriate even if he had engaged in some wrongdoing. Such can hardly be equated with the instant case wherein Mr. Gross, only a corporate officer, was a recipient of a citation for working without a permit, when in fact the citation was withdrawn when it was learned that the corporation had a permit.

Likewise, in *Farrar* supra and *Morrison* supra., the Fifth Circuit and Middle District of Pennsylvania respectively concluded that violations of fundamental rights were at issue, and therefore despite the absence of actual injury, nominal damages were appropriate. Those situations simply do not equate with the present facts, wherein a citation for a summary offense was issued mistakenly and then withdrawn.

III. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The City argued in the Third Circuit and that Court agreed "that given the outstanding DER citations and the findings of the Allegheny County Health Department, it is legally untenable that the jury could have found that the City acted in an arbitrary and irrational manner in revoking Panther Hollow's permits". (Pet.12a). Application of the standards requisite to establishment of a 42 U.S.C. § 1983 action to the facts established by Respondent at trial demonstrate the merits of the City's contentions in the Third Circuit. The Third Circuit has held consistently since *Rogin v. Bensalem Township*, 616 F.2d 680 (3rd Cir. 1980), that to establish a substantive due process violation, a plaintiff must prove: (1) the governmental action was not rationally related to a legitimate government interest, or (2) the governmental action was motivated by bias, bad faith or improper motives. The Circuit reaffirmed such standards in many cases including *Pace Resources v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir. 1983); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667 (3rd Cir. 1991); *Parkway Garage, Inc. v. The City of Philadelphia*, 5 F.3d 685 (3rd Cir. 1993) and *Blanche Road Corporation v. Bensalem Township*, 57 F.3d 253 (3rd Cir. 1995). The Third Circuit was virtually compelled to reach its conclusion because, if for no other reason, two independent governmental entities, the State DER and Allegheny County Health Department acting independently of the Respondent City, issued citations against PHC for

violations of State law and regulations and County ordinances. Further, contrary to petitioners' assertions, such violations of law were also violations of applicable City ordinances, and State law specifically vested in municipalities the right, if not the duty, to enforce such laws and regulations. This is evidenced by the Pennsylvania Sewage Facilities Act, Pa. 35 P.S. § 750.15, which provides in relevant part, as follows:

> "Nothing in this act shall be construed as estopping the . . . solicitor of a local agency from proceeding in courts of law or equity to abate nuisances forbidden under this act, or abate nuisance under existing law. It is hereby declared to be the purpose of this act to provide additional and cumulative remedies *to abate public health hazards and pollution of the waters of this Commonwealth,* and nothing in this act contained shall in any way abridge or alter rights of actions or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision of this act, for the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the . . . municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity *to suppress nuisances or public health hazards or to abate any pollution now or hereafter existing, or enforce common law or statutory rights,* [emphasis added]

The egregious nature of some of PHC's acts cannot be overemphasized in terms of their impact upon public and environmental welfare. By way of example, the disruption of sewage systems which resulted in the discharge of

human fecal matter for a period of approximately eight (8) months was itself sufficient reason to have revoked the permit at any time during such period. This is particularly so when the County Health Department advised the City that such discharge was accessible to insect vectors which would cause a danger to public health and welfare.

Petitioners' assertion that the Circuit decision was violative of the Seventh Amendment to the United States Constitution is without merit as an appellate court can and should grant a new trial where the verdict is against the overwhelming weight of the evidence. *Yohannon v. Keene Corporation,* 924 F.2d 1255 (3rd Cir. 1991).

Importantly, the Third circuit noted that it was not only the City that saw a problem on the property because even an engineering firm hired by PHC, GeoMechanics, Inc., stated in a written report "that dangerous and hazardous conditions have not been created to the degree indicated by the City of Pittsburgh." (Pet. 10a).

The Court of Appeals aptly summarized the nature of this case and the obviously required result when it stated that "Indeed, as we have pointed out, Gross' representative knew that there were serious problems on the property. It is simply not tolerable for a land use dispute of this kind to be packaged as a civil rights case under 42 U.S.C. § 1983". (Pet. 16a-17a).

CONCLUSION

For the foregoing reasons, this Court should deny petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE R. SPECTER, Esquire
Counsel of Record
Deputy City Solicitor
JACQUELINE R. MORROW, Esquire
City Solicitor

City of Pittsburgh
Department of Law
313 City-County Building
414 Grant Street
Pittsburgh, PA 15219
(412) 255-2019

ALLEGHENY COUNTY HEALTH DEPARTMENT
[LOGO]

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ALBERT H. BRUNWASSER, M.P.H., M.B.A.
director

3333 Forbes Avenue
Pittsburgh, PA 15213
Phone: 578-8030

November 9, 1989

City of Pittsburgh
Office of the Mayor
City County Building
Pittsburgh, PA 15219

ATTENTION: The Honorable Sophie Masloff, Mayor

RE: EXCAVATION SITE
PANTHER HOLLOW
CITY OF PITTSBURGH

Dear Mayor Masloff:

On October 24, 1989, a meeting was held at this office to discuss the Notice of Violation issued to the City of

Pittsburgh on October 6, 1989 regarding sewage discharges from septic systems at 27 and 29 Swinburne Street. At that meeting the representatives of the City of Pittsburgh and this Department specified on the attached list discussed the following problems relative to excavation operations conducted by Mr. Sol N. Gross, Ace Demolition, Inc. along Boundary Street in Panther Hollow.

1. Sewage discharges from septic systems at 27 and 29 Swinburne Street have resulted from excavation activities by Mr. Gross. Repair or replacement of these on-lot systems is impossible, and the City does not have accessible sewer tap-ins for these facilities. As public sewer lines are present in the area, this Department requests the City to provide accessible tap-ins for these structures to eliminate this health hazard.

2. Manholes for City of Pittsburgh sewer lines in the area are now below the new grade provided by Mr. Gross's filling operations. The stress that the increased earth load on these lines may pose must be evaluated and the manholes extended to make them accessible for routine maintenance at the new grade level. City representatives indicated that Mr. Gross has not been given the approval required for this work.

3. Fire hydrant(s), and possibly valves, for Pittsburgh public water lines have also been placed below the new grade level and must be raised to make these accessible at the new grade level.

4. No storm water management system appears to be in place, and substantial alteration of the natural hillside has been made, raising concerns regarding the potential destabilization of the hillside and the effect on down-grade properties. The Allegheny County Conservation District has verified the activities of Mr. Gross to be in violation of Erosion Control Regulations of the Pennsylvania Department of Environmental Resources adopted under the Pennsylvania Clean Streams Law. These violations include failure to provide an Erosion and Sedimentation Control Plan, failing to stabilize critical areas, and allowing sediment to flow into waters of the Commonwealth.

Your letter dated October 11, 1989 indicated that Louis Gaetano, Director, Department of Public Works, has been requested to address the sewage issues relative to 27 and 29 Swinburne Street. However, the remaining issues reviewed during the October 24th meeting lay within the jurisdiction of several City of Pittsburgh Departments including Highways and Sewers, Public Works, Planning, and Building Inspection. Therefore, we request that the Mayor's Office coordinate the various City agencies having jurisdiction in these matters to insure that Mr. Gross addresses all public drinking water, sewage, environmental, and public safety issues prior to further activity on his part. The City should consider having Mr. Gross cease all activities until such time as he has addressed the concerns outlined above and is in compliance with all permit, planning, and operational requirements.

Please contact me as soon as possible of your intentions regarding these issues, as this Department continues to be very concerned about the effect of Mr. Gross's activities on the public health and safety of the residents of this area of the City.

Should you have any questions or desire additional information or consultation, please contact me at 578-8030.

Sincerely,

/s/ Gerald M. Barron
Gerald M. Barron,
Deputy Director
Environmental Health
Services

ph

Attachment

cc: L. Gaetano
P. McDermitt

VIOLATION NOTICE
EROSION AND SEDIMENTATION CONTROL

ALLEGHENY County File No. _____

PITTSBURGH Municipality Inspection Date 7/27/89
Violation Notice Date
8/1/89

Project Description ACE DEMOLITION EARTHMOVING SITE

Location PANTHER HOLLOW – BOUNDARY ST.

Landowner and/or Responsible Official SOL GROSS,
Name

LANDOWNER
Title

An inspection of earthmoving activities being conducted at the above project site has revealed that the erosion and sedimentation controls at the site are not adequate to meet the requirements of the Department of Environmental Resources' Erosion Control Regulations contained at 25 *Pa. Code* § 102.1 *et seq.* and adopted under authority of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987. You are hereby notified that your failure to correct these violations of the Erosion Control Regulations noted below within 15 days of the date of this notice may subject you to enforcement action and penalties under the Clean Streams Law, with each day of violation constituting a separate offense. A statement setting forth the steps which have been taken to correct these violations must be submitted to the ALLEGHENY COUNTY conservation district, 208 INA BLDG., PARKWAY CTR.,

PGH., PA within 15 days of the date of this notice.
15220
A follow-up inspection will be conducted to determine compliance.

The following checked items were found in violation and must be corrected:

X No Erosion and Sedimentation Control Plan (25 *Pa. Code* § 102.4). A copy of your plan must be submitted within 15 days of the date of this notice.

_ Inadequate Erosion and Sedimentation Control Plan (25 *Pa. Code* § 102.11). A copy of your revised plan must be submitted within 15 days of the date of this notice.

_ Erosion and Sedimentation Control Plan not implemented.

X Critical areas not stabilized (25 *Pa. Code* § 102.12(a))

_ Sedimentation basin full of silt (25 *Pa. Code* § 102.13(a))

_ No sedimentation basin (25 *Pa. Code* § 102.12(t))

_ No diversion ditches (25 Pa. Code § 102.12(b))

X Sediment flowing in state waters

_ _____

/s/ Harry R. Barnett
Inspector

_____

ALLEGHENY COUNTY HEALTH DEPARTMENT
[LOGO]

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MARGOT WOODWELL

3333 Forbes Avenue
Pittsburgh, PA 15213
Phone: 578-8026

February 28, 1990

CERTIFIED MAIL

Ace Demolition Company
1807 Wightman Street
Pittsburgh, PA 15217

ATTENTION: Sol Gross

RE: **COMPLIANCE ORDER**
PANTHER HOLLOW
BOUNDARY STREET
CITY OF PITTSBURGH

Dear Sir:

Excavation activities by the Ace Demolition Company at the Panther Hollow Boundary Street proposed parking lot removed the leach field for the subsurface sewage disposal systems (septic systems) serving properties known as 27 and 29 Swineburn Road. The removal of the leach fields has created a public health hazard by allowing raw sewage to be discharged directly to the ground.

Under the authority of the Allegheny County Health Department, you are hereby ordered to correct and abate the health hazard caused by the actions of the Ace Demolition Company by March 23, 1990.

Sincerely,

/s/ Gerald M. Barron
Gerald M. Barron,
Deputy Director
Environmental Health
Services

st
cc: John W. Schombert, ACHD, PDWWM
Mary Contura, Solicitor, City of Pittsburgh
Larry K. Stefl, ACHD, Central District

ALLEGHENY COUNTY HEALTH DEPARTMENT
[LOGO]

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M. KATHLEEN WINTER, Ph.D., R.N.
MARGOT WOODWELL

3333 Forbes Avenue
Pittsburgh, PA 15213
Phone: 578-8026

March 20, 1990

CERTIFIED MAIL

Panther Hollow Corporation
1807 Wightman Street
Pittsburgh, PA 15217

ATTENTION: Sol Gross

RE: **COMPLIANCE ORDER**
PANTHER HOLLOW
BOUNDARY STREET
CITY OF PITTSBURGH

Dear Sir:

Excavation activities by the Panther Hollow Corporation at the Panther Hollow, Boundary Street proposed parking lot removed the leach field for the subsurface sewage disposal systems (septic systems) serving properties known as 27 and 29 Swineburn Road. The removal of the leach fields has created a public health hazard by allowing raw sewage to be discharged directly to the ground.

Under the authority of the Allegheny County Health Department, you are hereby ordered to correct and abate the health hazard caused by the actions of the Panther Hollow Corporation by April 20, 1990.

Sincerely,

/s/ Gerald M. Barron (gwl)
Gerald M. Barron,
Deputy Director
Environmental Health Services

st
cc: John W. Schombert, ACHD-PDWWM
Mary Contura, Solicitor, City of Pittsburgh
Larry K. Stefl, ACHD-Central District

ALLEGHENY COUNTY HEALTH DEPARTMENT
[LOGO]

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MARGOT WOODWELL

3333 Forbes Avenue
Pittsburgh, PA 15213
Phone: 578-8026

July 24, 1989

CITY OF PITTSBURGH
OFFICE OF THE MAYOR
513 City-County Building
Pittsburgh, PA 15219

ATTN: Mina Gerall
Executive Assistant

RE: Excavation In
Panther Hollow
Pittsburgh

Dear Ms. Gerall:

In response to a complaint, an inspection of the referenced property was conducted on July 20, 1989 by representatives of this Department.

That inspection revealed that extensive excavation and fill operation being conducted by Mr. Sol Gross, Ace Demolition. Briefly, the excavation involves moving the earth from the hillside into the valley. In some areas as much as 20 feet of fill has been placed on top of Boundary Street.

The investigation prompted several concerns:

- Does Mr. Gross have all the necessary permits?
- Is the filling operation being conducted in a controlled manner?
- Is the hillside stable, and will it remain stable?
- Is adequate fire protection available for the homes adjacent to the site?
- Will the excavation have an impact on the bridge supports in the valley?
- Is there a storm water management plan or erosion control plan in place?

Already, it seems that at least two septic systems have been damaged.

I refer these conditions to your attention and request you coordinate appropriate responses by all City of Pittsburgh agencies having jurisdiction over the above. I recommend that a meeting at the site be initiated to ensure a

cohesive response to the project. Certainly the Health Department would like to participate in such a meeting.

I thank you in advance for your assistance and ask that you keep me posted on the status of your investigation. If I can be of any assistance, please do not hesitate to contact me at 578-8030.

Sincerely,

Gerry
/s/ Gerald M. Barron
Gerald M. Barron
Deputy Director
Environmental Health
Services

mmg
cc: Harry Barnett
Allegheny Co. Conservation District

J. Kish, Health Officer
Central District

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MARGOT WOODWELL

ALBERT H. BRUNWASSER, M.P.H., M.B.A.
director

3333 Forbes Avenue
Pittsburgh, PA 15213
Phone: 578-8047

October 6, 1989

PROOF OF MAILING

City of Pittsburgh
Office of the Mayor
City County Building
Pittsburgh, PA 15219

ATTENTION: The Honorable Sophie Masloff, Mayor

RE: NOTICE OF VIOLATION
27 AND 29 SWINBURNE STREET
4TH WARD, PITTSBURGH

Dear Mayor Masloff:

This office recently verified the presence of malfunctioning/inadequate on-lot sewage disposal systems at the subject properties which are located in the Panther Hollow section of Oakland. The malfunction located at 29 Swinburne is directly attributable to excavation operations conducted by Sol N. Gross, Ace Demolition Incorporated, pursuant to the construction of large parking lot facility which has substantially altered Boundary Street and increased the depth of the current municipal sewer line.

Please be advised that this discharge of sewage poses a potential danger to the health of the public since the sewage is accessible to insect vectors which may transmit diseases and constitutes a health hazard under the Local Health Administration Law, Act 315. In addition, this sewage discharge constitutes a violation of the Pennsylvania Clean Streams Law, Section 201 and 202, and the Pennsylvania Sewage Facilities Act, Section 5 and 10. Sewage within the confines of municipal boundaries is the responsibility of the municipality.

Therefore, we request that the city provide an accessible public sewer connection for the subject properties. It is our desire to work with the City of Pittsburgh toward resolution of this matter in an expedious manner.

Therefore, a conference has been scheduled for 1:30 p.m., October 24, 1989 at this office to review this matter with you. We request that the appropriate City of Pittsburgh officials be available to attend. Should the above scheduled date be inconvient or should you have any questions, please contact this office.

Sincerely,

/s/ John W. Schombert
John W. Schombert, Chief
Public Drinking Water &
Waste Management

LKS/ph

cc: M. Gerall
P. Imhoff
L. Gaetano
bcc: W. Bancroft
N. Clark
R. Erlwein
J. Kish
J. Fagnelli
G. Butia
L. Stefl

MEMORANDUM

TO: Jane Downing
Paul Farmer
Maureen Hogan

FROM: Dan Sentz

DATE: 25 October 1989

SUBJECT: Panther Hollow; Allegheny County Health Department (ACHD) Meeting On Actions By Gross Which Have Created A Health Hazard

---

Yesterday Tony Tarasi (DPW), Dave Borneman (DEC) and I met with John Schombert (ACHD) and four other Health Department officials to discuss a course of action to address a Panther Hollow health hazard created by Sol Gross. This hazard has been created as a result of the excavation work Mr. Gross performed in Panther Hollow in the vicinity of Swinburne Street. Two homes had functioning septic systems before Gross excavated their drainage fields. (Septic systems are composed of a septic tank and a drainage field.) While the fields were wholly or partially on Mr. Gross's property his excavation is of dubious legality. ACHD lawyers believe the two affected residences could successfully sue Gross for his creation of the health hazard and destruction of their property. (Lawyers themselves were not at the meeting so I'm not sure if the basis for the legal action would be "squatters rights", the creation of a health hazard, or some long forgotten easement.)

The City is now responsible under State Law for providing sewers to the two residences. A new septic system

drainage scheme is not feasible due to the small size of the two affected properties and the slope, and it could cost as much as the sewer connection if attempted.

There are City sewers in the area and laterals could be extended to the property line of the two homes, providing we get an easement from Gross. Typically the City would assess the property owners (the two residences and Gross) in an area where sewerage was made available. Additionally the two homes would be responsible for connections from the homes to the City laterals. The occupants of the homes are elderly, on welfare and almost certainly not able to pay for there connections let alone the sewerage extension assessment. The total cost would almost certainly exceed the value of their properties.

We could buy the two homes but the people, as would be expected with elderly who have been living there all their lives, don't want to sell. Further, this is probably just what Gross would want; get them out of his way. Instead the City should explore assessing Gross for the entire sewerage cost. He should be prevented from opening his parking lot until the sewerage is in place as he has created a health hazard.

Health Department personnel also noted that Gross had excavated the slopes and removed vegetation from the same. I noted this last Friday also. While I did not go above the Anderson Bridge ACHD people said they noted excavation triggered slope movement in that vicinity with the potential to adversely affect three more homes and the sewer which serves them.

Attached you will find a copy of the Land Operations Permit issued to Gross by Jim Brown 27 July 1989. You

will note that it was a permit to fill only; excavation is lined out in two places and the section on vegetation removal on steep slopes is blank. Further 16000 c.y. is the limit of the permitted fill. The slopes were excavated, vegetation was removed from them and the fill was approximately seven and one-half times that permitted (a very conservative estimate).

Additionally the slopes are in the Landslide Prone Overlay District and the regulations pertinent to this Zoning District were ignored. (City and ACHD personnel have indicated the Gross fill depth is 20 to 30 feet in much of the Hollow.) Finally he excavated up to the property lines which is not permitted by City regulations.

I suggest Gross have all permits revoked and all work stopped as a result of his excessive exceedence of what he was permitted to do. I further suggest that Jim Deglau be prevented from ever acting as a Special Inspector on any project in the City again. To claim what was done is in conformance with the permit either reflects incompetence or lack of credibility. (Copies of the other project related zoning applications are attached.)

The ACHD has had numerous experiences with Gross and none of them have been positive. He has repeatedly violated ACHD regulations related to solid waste disposal (dumping) and has apparently ignored court orders. Gross has no credibility with the Health Department and they have suspicions that part or all of what was to be hauled out was buried. (ACHD personnel did see a few tires in the fill.) Since Degau cannot be trusted as a Special Inspector and given the experiences of the

ACHD I think several core borings at Gross's fill site are appropriate to ascertain if the fill is "clean".

The ACHD is writing to the Mayor requesting that all Gross's approvals be rescinded until the health hazards he has created are addressed. I think we should rescind all approvals until all problems Gross has created are addressed not only on paper but via physical construction implementation of mitigating measures.

1. The fill should be evaluated via core borings.
2. The water line should be constructed.
3. The sewer(s) should be constructed.
4. Hillside stability should be evaluated and mitigating implemented; including an assessment of any damage Gross may have caused the five affected homes and City infrastructure.
5. All road and manhole work should be completed.
6. The regulations of the Landslide Prone District should be satisfactorily addressed.
7. An after the fact Conditional Use Process (as is required for major excavation such as this) should be completed.

The overwhelming message from ACHD is don't trust Gross; he has no credibility. Both Zoning and BBI seem to feel Gross is doing something good for the City. Gross's actions have been physically, socially, and legally detrimental to the City. Credibility in our approval and inspection procedures has suffered significantly on this project. I suggest a representative from the City Law

Department be involved in all future meetings of any sort on this project and all approvals related to this project be approved directly by Jane or Paul.

DS/ljs

cc: Tony Tarasi, Public Works
Dave Borneman, Engineering & Construction
John Schombert, Allegheny County Health Department
Jim Brown, Zoning